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No. 96-582

IN THE
Supreme Court of the United States
October Term, 1996

Westboro Baptist Church, Inc.,
Petitioner

vs.

St. David's Episcopal Church

ON PETITION FOR WRIT OF CERTIORARI
TO THE KANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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This petition pertains to a preliminary injunction by a trial judge in Topeka, Kansas, against Westboro Baptist Church in favor of St. David's Episcopal Church which created a buffer zone against picketing 30 minutes before and after religious services, after Westboro had conducted anti-homosexual lawful religious public picketing outside of St. David's church building for several years.

Before seeking an injunction against Westboro's picketing, St. David's engaged in counter-picketing outside of its own church building for a period of about seventeen months. St. David's claimed Westboro's picketing was a private nuisance because alleged words by a few of the picketers were interfering with the "worship experience" (921 P.2d at 829) of some of the counter-picketers. The injunction was upheld on appeal by the Kansas Court of Appeals, on a finding that an injunction could issue against lawful private picketing on a public sidewalk to protect the "worship experience" of persons who disagreed with the words, uttered and on signs, of the picketers. The Court of Appeals assumed Westboro's words were protected and lawful in its opinion.

A. Was it error for the state courts to find that a church building is entitled to the same level of privacy as a residence?

B. Was it error for the state courts to fail to recognize that St. David's had waived any privacy interest claimed in the church building or during any religious worship service by its own public actions?

C. Was it error for the state courts to enjoin picketing without any finding that any activity by the picketers was unlawful?

D. Was it error for the state courts to enjoin more than "focused picketing"?

E. Is the state court injunction content neutral, or does it burden more speech than necessary to accomplish any legitimate government interest?

F. Was it error for the state courts to find that the government could be forced to protect the "worship experience" of St. David's churchgoers from alleged private interference by Westboro's picketers, in violation of the Free Exercise Clause and the Establishment Clause?

G. Was it error for the state courts to treat Westboro's picketing as a nuisance, and thereby allow the imposition of civil liability against lawful, protected activity, especially in the absence of any allegation or evidence of any violent or unlawful actions by Westboro's picketers, and based solely on a subjective, emotive claim that Westboro's message interfered with the "worship experience" of St. David's churchgoers?

H. Was it error for the state courts to afford Westboro's speech less protection because children were allegedly present?

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REFERENCE TO OFFICIAL REPORT OF OPINION

St. David's Episcopal Church v. Westboro Baptist Church, 22 Kan.App.2d 537, 921 P.2d 821 (1996).[1]

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment or decree sought to be reviewed: The Kansas Court of Appeals' opinion was issued June 21, 1996.

B. Date of any order respecting a rehearing: On August 7, 1996, the Kansas Court of Appeals denied a motion for rehearing or modification. On September 9, 1996, the Kansas Supreme Court denied a petition for review.[2]

C. Statutory provisions conferring on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: 28 U.S.C. Section 1257 permits review by writ of certiorari of a final judgment by the highest court of a State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the

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[1]The only parties to the proceedings at the lower court are reflected in the caption, St. David's Episcopal Church and Westboro Baptist Church, Inc. Westboro has no corporate affiliate. The corporate affiliations of St. David's are unknown.

[2]K.S.A. 60-2101(b), K.S.A. 22-3602(d) and Kansas S.Ct. Rule 8.03(e)(1) provide for review by the Kansas Supreme Court as a matter of right from a final decision of the Kansas Court of Appeals in a case in which a question under the Constitutions of the United States or the State of Kansas arise for the first time as a result of said decision.

United States.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

First Amendment to the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1: .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Westboro Baptist Church is a small Old School Baptist Church in Topeka, Kansas. Beginning in early 1991 Westboro began a ministry of public religious pickets with a central message of "God Hates Fags[3]". In connection with the ongoing debate in this country about homosexuality, Westboro and her picketers are determined to introduce into the discussion, through lawful picketing, such messages as, "Why did God destroy Sodom and Gomorrah?", "Remember Lot's Wife"

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[3]Westboro uses this term not to be gratuitously pejorative, but advisedly, as it is a Bible word, translated in Amos 4:11 "a firebrand". The word means, loosely, fuel for fire, and is appropriate given Westboro's message. The etymology of the currently politically correct term, the word "gay," persuades Westboro that it is not an acceptable or proper alternative.

(Lk. 17:32), "Love = Truth", "Fags = AIDS = Death", "Hate is a Bible Value", "Fear God", "One Man, One Woman, One Life" and "Fag God = Rectum[4]".

The picketing is a religious practice, done pursuant to a sincerely held religious belief that the Lord's people should, while on this earth, speak with the people in the gate (Ps. 127:5), cry aloud, spare not, lift up their voices like a trumpet, and show the people their sins (Isa. 58:1), and lift up a banner (Ps. 20:5) or ensign (Isa. 18:3) to the people bearing a gospel message. Westboro has engaged in this picketing ministry continuously from early 1991 to the present date, at places all around the country. Westboro pickets daily, and has conducted a minimum of 10,000 pickets to date.

With time Westboro began picketing at the intersection of 17th Street & Gage Boulevard, two main streets in Topeka, Kansas. St. David's Episcopal Church is on the northwest corner, with front doors facing 17th Street. St. David's has no point of access or ingress/egress from the east or south. Persons attending church at St. David's park in the church's parking lot to the west of the building, and when there is occasional overflow, in a bank parking lot across 17th Street to the south. (This bank is patronized by Westboro and several of her members.)

Westboro originally picketed mainly on the four corners of the intersection. Picketers did not originally stand on the sidewalk that ran directly in front of St. David's, running east and west, or on the sidewalk directly in front of the bank and bank parking lot running

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[4]This is an application of the language at Phil. 3:19, "whose god is their belly," the exposition of which is that those who live a God-defying life find their god (that which they serve) in that which brings them pleasure.

east and west, on 17th Street.

Westboro picketed at this location to convey a religious message about homosexuality to persons attending St. David's, and to warn those passing by. Westboro's picketers carried various signs with references to the position taken by St. David's Episcopal Church, and the Episcopal church, about homosexuality.[5]

Before, during and after the period of Westboro's picketing, St. David's engaged in a series of public activities related to the issue of homosexuality and Westboro's picketing. These activities included using the occasion of religious worship services to criticize Westboro's picketing, privately and on camera (including for ABC's *20/20* program); counter-picketing against Westboro at a local park; making public speeches in the community condemning Westboro's message, and about homosexuality and the church's response to that lifestyle; running ads in the local paper on these subjects; posting large signs outside St. David's church building with such messages as "God's Love Speaks Loudest"; inviting the public to join in opposition to Westboro's religious public activism; holding meetings in the church building to plan and organize activities to counter Westboro's religious public activism; contacting local office holders (such as City Council members) to seek punishment or limits on Westboro's picketing; and so forth. St. David's church building was the platform for, and worship services the centerpiece of, these activities.

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[5] [5] Samples of Westboro's signs include "Fag Church", "Fags Wed Here" [in reference to the Episcopalian church's support for homosexual marriages], "Layne = Spong" [in reference to St. David's clergy and an Episcopalian leader named Spong who has written nationally in support of the homosexual lifestyle, and has spoken at Foundary Methodist Church, President Clinton's church of choice, as recently as last December, referring to Jesus Christ as a "drag queen"], etc.

At the same time, the Episcopal Church (like other churches and denominations) took public positions about homosexuality through a variety of means, including press statements and appearances by national church leaders. Also in this time period, nationally, statewide and locally, the Episcopal Church, through its leaders, introduced the topic of homosexuality to its members for discussion and consideration, including whether homosexuality should still be considered a sin, whether homosexual marriages should be recognized and whether homosexuals should be permitted to serve as clergy. In this period, a Kansas Episcopal bishop widely circulated a position paper, provoking further discussion on these subjects.

By these and other means, St. David's members and leaders became directly involved in the public debate about homosexuality, and how society and the churches should respond to a national "coming out" and all else that the homosexual agenda entails. Hence, Westboro picketed at 17th & Gage commencing in February, 1992.[6]

After Westboro commenced this picketing, St. David's began counter-picketing at the same intersection, and invited the public to join them. The counter-picketers placed themselves on the four corners next to Westboro's picketers. With time picketers and counter-picketers began to string out down the sidewalks on both sides of 17th Street, going from the intersection to the west.

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[6] Westboro similarly has picketed at other churches, in Topeka and elsewhere, and at the headquarters of different denominations at various places throughout the country, because of the position taken by various churches and denominations about how the church should respond to homosexuality. All such picketing is done pursuant to a strongly and sincerely held religious belief by Westboro and her members that the Lord's people in the earth have a duty to "cry against the alter" (1 Ki. 13:2) and otherwise publicly convey the message of the Bible on important, timely, soul-of-the-nation-impacting issues.

Picketers and counter-picketers alike lined up on the sidewalk directly in front of St. David's, on the north side of 17th Street, from the intersection to where the sidewalk ended at St. David's driveway. Both groups commingled and co-existed for months. At times there were verbal exchanges. On a rare occasion there was minimal physical contact, amounting at most to jostling and sign-space jockeying. The only evidence of this limited physical contact came from Westboro's affidavits, and reflected that those who joined St. David's counter-picketing precipitated this contact.[7] This picketing and counter-picketing continued for a period of months, and into the Summer of 1994.

Westboro picketers specifically do not engage in acts of civil disobedience, do not picket in the street or in drives, do not block drives or doorways, and do not otherwise participate in the kinds of acts some picketing groups deem necessary to their cause. Westboro's picketers place themselves on public sidewalks, and when pedestrians and cyclists come through, the walk is cleared. No picketing is done on the church's property, access is not blocked in any way, and literature is not

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[7] The record reflects three physical altercations in the vicinity of 17th & Gage. Two occurred outside the buffer zone. Both involved attacks *against* the Westboro picketers by persons passing by who disagreed with their message. No St. David's person was involved in these incidents, and Westboro's picketers were the victims. The local prosecutor, who campaigned on a promise to get Westboro's picketers off the streets if elected, prosecuted Westboro picketers over these incidents, and not the attackers. The cases resulted in acquittal or dismissal. On a third occasion, a young man who attends St. David's ran from St. David's church building, when no picketing by either side was occurring, spotted Westboro's preacher, Fred Phelps, in a truck at a red light headed east on 17th Street, ran to the truck and struck Mr. Phelps in the face through the open window of the truck. *Never* was any physical altercation or violence, or threat of physical altercation or violence, by the Westboro picketers toward St. David's picketers or churchgoers, alleged or shown.

forced on persons passing by. No effort is made to physically deter anyone from going into St. David's or any other church. Westboro picketers post themselves with their signs and let their signs convey their message. Westboro picketers also, from time to time, engage in the singing of hymns *a cappella*.

On June 13, 1994, St. David's filed a civil action in the District Court of Shawnee County, Kansas, against Westboro. St. David's alleged that Westboro's picketing was a nuisance. Westboro removed the case to federal court because of the constitutional issues presented. The federal court remanded the case to state court on July 5, 1994.

On July 18, 1994, St. David's filed a motion for a temporary restraining order. St. David's submitted affidavits which recited some limited alleged words spoken by a handful of Westboro picketers during the period of picketing/counter-picketing. The affidavits averred that the words were upsetting to the hearers, who were predominantly counter-picketers (and only some of whom were actually members of St. David's). Most of the specific incidents alleged occurred outside of the buffer zone sought. The affidavits by St. David's did not recite any act or use of physical force by Westboro's picketers; did not recite any criminal activity by Westboro's picketers; did not recite any blocking of access into the parking lot of building by Westboro's picketers; and did not recite any disruption of traffic flow around the intersection.

Some of the affidavits *opined* that violence may erupt, because of the affiants' violent disagreement with Westboro's words, allegedly uttered and on their signs. The theme of the affidavits was hysterical hyperbole, with abundant synonyms for "I am offended", and suggestions that strong reaction to words might turn physical. The

words allegedly uttered by Westboro's picketers, and the words on the picketers' signs, were characterized as having the intent of provoking or the potential for violence. The state courts elevated these characterizations to the level of a "potentially violent atmosphere" (921 P.2d at 829), and justified the injunction accordingly.

The affidavits are heavily laced with strong statements of disagreement with the *words, including frequent references to the words on the signs*, and with expressions of strong emotive reaction by the listeners.[8]

On July 19, 1994, the trial court conducted a telephone conference with counsel. During that conference the trial court advised Westboro's counsel that Westboro could make a response to the request for temporary injunction by July 21, 1994, at 12:00 noon.

On July 21, 1994, between 10:50 and 11:00 a.m., Westboro's counsel hand-delivered extensive material in opposition to the motion for temporary restraining order, including numerous affidavits, photographs and other items of evidence, and several hours of video footage of

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[8] E.g., "If defendants were Christians, they would understand the celebrations of Christmas and the Advent season." "Their messages of filth portrayed on their signs many times have no relevance whatsoever to any potential issue with our parish." "I find that the signs displayed by members of the Westboro Baptist Church offensive [sic], and I find that the language used by the members of the church is offensive, and I truly believe that much of the language that is spoken is said with the intent to cause some kind of verbal or physical reaction from the members of St. David's." "I do continue to go to church, but every time I see the Phelpses, I develop a feeling of hostility and it takes several minutes for me to be inside the church and inside the service before I get centered enough to appreciate the worship service that I came for." "Among the signs held by members of the church were signs that stated 'God Hates Fags' and other signs purporting to give specific biblical citations to support the proposition that God hates homosexuals."

pickets at St. David's.

Before receiving any of this material, the trial court contacted the local Sheriff, at about 9:30 a.m. on July 21, 1994, and arranged for Sheriff's deputies to meet him at the intersection of 17th & Gage to take measurements for the entry of a TRO. This meeting at St. David's occurred from about 11:15 a.m. to 11:30 a.m. The trial court entered a TRO on July 21, 1994, at 2:00 p.m., about three hours after Westboro delivered her response and evidence.

The trial court made no finding that Westboro's picketing was unlawful in any respect, or that any Westboro picketer had committed any criminal or civil wrong. The trial court entered no order with a less restrictive injunction or other directives about the manner of Westboro's picketing. The trial court made no finding, and there was no evidence to support any finding, that Westboro ever disrupted the flow of traffic or physically blocked access to St. David's church building.

The TRO prohibits Westboro from engaging in "focused picketing" within 36 feet to the east, west and north and 215 feet to the south of St. David's church property one half hour before or after a religious event. The effect of this injunction is to move Westboro's picketers across Gage Boulevard during the prohibited period, including from the northwest corner of the intersection, where it is undisputed there is no ingress or egress, and including from the southwest corner of the intersection, which is not on the same side of the street as the property owned by St. David's, and is not directly adjoining St. David's property.

"Focused picketing" was originally defined as driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around plaintiff's

house of worship while carrying a banner, placard or sign. Westboro picketers were also prohibited from making any noise by singing, chanting, shouting or yelling, that could be heard through the walls of the church during any religious event. On July 27, 1994, the trial court amended the TRO and redefined "focused picketing" to prohibit the presence of Westboro picketers within the buffer zone during the prohibited period with or without a banner, placard or sign.

On July 25, 1994, Westboro filed a motion to vacate, alter, amend or modify the TRO. The motion was overruled on August 9, 1994, and the TRO remained in full effect. On November 28, 1994, Westboro filed a motion asking the trial court to dissolve or modify the TRO. Westboro requested to picket on the northwest and southwest corners of the intersection, which were not access or ingress/egress points for any churchgoers. Westboro also asked permission to picket directly in front of St. David's church building during services where traditionally no children were present (such as the early Sunday morning time period). After a brief hearing on December 19, 1994, all requests were denied. On March 16, 1995, the order denying modification or dissolution of the TRO was journalized. On April 13, 1995, Westboro filed a notice of appeal to the Kansas Court of Appeals.[9]

On June 21, 1996, the Kansas Court of Appeals upheld the injunction. That court noted in its opinion that no determination had been made that Westboro's speech was unprotected. "In its TRO, the trial court ... deferred

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[9] This appeal was based on Kansas statute which permits an immediate appeal from a preliminary injunction, and legal authorities which indicated that the TRO was a preliminary injunction, by its nature, scope and duration. St. David's challenged jurisdiction at the outset of the appeal, and the Kansas Court of Appeals concluded that it should retain the appeal.

the issue of whether Westboro's picketing involved unprotected speech." 921 P.2d at 827. "[B]ecause the trial court has not yet addressed the issue of whether Westboro was employing unprotected speech in its picketing activity, this court is not in a good position to determine that issue." 921 P.2d at 828.

The Kansas Court of Appeals "[had] a problem with the [trial] court's order proscribing noise" *because* "there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was interfering with the worshiping by St. David's." 921 P.2d at 832. Yet the Kansas Court of Appeals upheld the injunction based upon its perceived obligation to protect *the "worship experience"* during this non-disrupted religious worshiping from disruption by private citizens. A petition for review to the Kansas Supreme court was denied on September 9, 1996.

WHERE THE CONSTITUTIONAL ISSUES WERE RAISED WITH THE STATE COURTS.

All of the constitutional issues addressed before this Court in this petition were raised with the trial court, as noted above, at least twice, through Westboro's response to the request for TRO and motion to vacate, modify, etc., the TRO, both filed in July, 1994. Some of the issues were also raised in a further motion to modify filed in November, 1994. These issues were all also presented to the Kansas Court of Appeals, in briefs filed before the June 21, 1996, opinion, and in a motion for rehearing or modification filed with that court. These issues were all also presented to the Kansas Supreme court in Westboro's petition for review to that court.

REASONS THE WRIT SHOULD ISSUE

A. IT WAS ERROR FOR THE STATE COURTS TO FIND THAT A CHURCH BUILDING IS ENTITLED TO THE SAME LEVEL OF PRIVACY AS A RESIDENCE.

The effect of the state court injunction was to afford to a church building the same level of privacy that this Court has afforded a residence. In so doing, the state courts overlooked the vast difference between those two buildings. Throughout their orders, the state courts spoke of protecting religious worship services. Yet the record clearly reflects that there was never any allegation that the worship services were being disrupted. Thus, the reality of the injunction is that it afforded a privacy interest in the church building to such a degree that public lawful religious picketing on a public sidewalk was prohibited in the absence of any unlawful acts, any finding of civil wrong, and any disruption of a religious worship service. Further, the injunction protected a church building that was being used to avidly promote a position on an ongoing public issue.

The state courts made no distinction between the church building and worship services.[10] Such a distinction is critical. A residential building has only one use and purpose, which is to serve as a residence. A church building, on the other hand, has many uses and purposes beyond religious worship services. Those uses and purposes are very public, and have a significant

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[10] The Court of Appeals interchanged the "place of worship" and the "religious worship" in justifying the injunction. "We agree with the trial court and find that, in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well." 921 P.2d at 830. "[O]ne's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy." *Id.*

impact on the community and society as a whole. Activities occurring in church buildings historically have had considerable power, influence and impact on public issues. Those uses and purposes are entirely inconsistent with a conclusion that church buildings should be afforded the same level of privacy as residences.

There was no allegation by St. David's that the worship services were disrupted. Further, if *actual disruption* had occurred of St. David's religious worship service, *while the worship service was in session*, St. David's had a ready remedy at hand, in the form of a Topeka City Ordinance which prohibits the disruption of a religious worship service. No such relief was ever sought, because no disruption of religious worship services was occurring.[11]

The petition and affidavits filed by St. David's in this case do not allege that disruption of a religious worship service occurred. Indeed, the Court of Appeals noted that "there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was interfering with the worshiping by St. David's." 921 P.2d at 832.

This Court has noted that the relevant inquiry to determine whether privacy should be afforded a building is the use of the building. *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966).

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[11] Similarly, Kansas statute prohibits disorderly conduct, which the Kansas Supreme Court has construed to mean fighting words. See K.S.A. 21-4101 and *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980). So if Westboro's picketers were using fighting words, a remedy was available.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." 408 U.S. at 116, 92 S.Ct. at 2303.

The use of church buildings in American communities, historically and increasingly, is completely inconsistent with a ruling that the church building should be treated as a residence building.

B. IT WAS ERROR FOR THE STATE COURTS TO FAIL TO RECOGNIZE THAT ST. DAVID'S HAD WAIVED ANY PRIVACY INTEREST CLAIMED IN THE CHURCH BUILDING OR DURING ANY RELIGIOUS WORSHIP SERVICE BY ITS OWN PUBLIC ACTIONS.

The state courts completely disregarded St. David's waiver of any claimed privacy. It is important to recall that Westboro's picketing and St. David's counter-picketing occurred simultaneously for seventeen months. Indeed, St. David's specifically and purposefully came to the public sidewalks outside its own building and engaged in public picketing. St. David's picketed in the same physical location as Westboro, after announcing with great public flourish their intent to do so, and then inviting other to join them. Thus, it is incredible that after many months of picketing by its members, St. David's filed a petition and affidavits claiming that picketing on the public sidewalks outside the church building constituted a private nuisance and interference with the "worship experience". (This position can only be explained by recognizing that St. David's position is content-based.)

In addition to counter-picketing, St. David's engaged in substantial additional public activity, using the church building as its platform, and religious worship services as the time, to engage in these public activities.

The language of this Court in *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 2294-2295, 65 L.Ed.2d 263 (1980), and the legal principle announced there, was ignored by the state courts. The legal principle announced is that privacy, even in a residence building, can be waived, if the building is used for "nonresidential" purposes. Examples given by this Court are using the building for a precinct committee meeting, or posting signs and posters supporting a candidate in the windows or yard. By those simple acts, the residential privacy zealously protected by this Court can be waived.

Even if a privacy interest should be afforded a church building, or the "worship experience", St. David's has waived its privacy. St. David's used its building for non-religious-worship-service purposes repeatedly and continuously. Further, St. David's used its religious worship services, and the "worship experience", to publicly promote a position on homosexuality repeatedly. This is a clear waiver of any privacy interest in the church building, even if that building was entitled to the same level of protection as a residence building. St. David's waiver of the privacy interest it claimed was utterly ignored by the state courts.

C. IT WAS ERROR FOR THE STATE COURTS TO ENJOIN PROTECTED, LAWFUL PICKETING WITHOUT ANY FINDING THAT ANY ACTIVITY BY THE PICKETERS WAS UNLAWFUL.

St. David's did not allege that the picketers were acting unlawfully, by their words or their picketing. Instead, they alleged that the message was interfering with the "worship experience", and they feared the message would prompt violence because they violently disagreed.

It is important to note that St. David's was video taping the picketing/counter-picketing sessions for many

months, and had full control over what was videotaped from inside the church building. No video footage was introduced which reflected any churchgoer inside the church building who was upset or in any manner deterred from fully participating in worship services.[12] Nor was any video footage introduced which suggested that Westboro's picketing left the public sidewalk and went into the building, in any manner. In short, there was neither evidence of any kind, nor allegation of any kind, that the picketing/counter-picketing activity was having any impact on the religious worship services.

The injunction in this case was issued on the assumption that Westboro's speech and picketing was protected.[13] Indeed, the petition and affidavits do not allege any unlawful *picketing*. Instead, again, they only allege that words were uttered by picketers which were allegedly offensive and which allegedly interfered, by some subjective assessment, with the "worship experience".[14] Thus, when the injunction was issued, and

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[12] To the contrary, video footage showed good cheer, laughter, and open, loud, group mocking of Westboro's picketers, including referring to her preacher as the "Prince of Darkness," a recognized reference to Satan. Video footage also showed hand holding prayer with supplications to the Almighty to help the counter-picketers in their battle against the "evil" and "hate" of the Westboro picketers. St. David's picketers had the full run of their "worship experience".

[13] "If the trial court finds Westboro has employed constitutionally unprotected speech as well in its picketing activities, then this issue will weigh even more in St. David's favor." 921 P.2d at 829. The troublin, question presented, then, is what *additional* restrictions would the state courts place on Westboro's picketing than the sweeping injunction that has been in place for over 26 months should a finding be made that Westboro's speech was unprotected?

[14] It is important to note that the material submitted by Westboro, while the trial court was at St. David's measuring the

through the many months it has been allowed to stand, it has enjoined lawful activity in every respect.

In *Lawson v. Murray*, ---- U.S. ----, 115 S.Ct. 2264, 132 L.Ed.2d 269 (1995), Scalia, J., concurring, an injunction against picketing which had been expressly found not to be tortious was condemned. There, as here, the injunction was entered in expressed reliance on this Court's opinion in *Madsen v. Women's Health Center, Inc.*, ---- U.S. ----, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Justice Scalia said:

> The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law. .... But the threat to the First Amendment becomes positively alarming when violation of the law is not even a necessary prelude to this expansive discretion--when the defendant's prior speech (and proposed future speech) has been expressly found not to constitute a crime or common law tort, and the only basis for the injunction is the nebulous "public policy" of the State enforced by an

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distance for a TRO, included substantial evidence that the allegations of the petition and affidavits were not true, or at a minimum were incomplete. Westboro contends that even if the content of the petition and affidavits is true, the injunction was unwarranted under the law. Westboro is compelled to note, however, that the allegations are not true, and the depiction of Westboro's picketers in the petition and affidavits would not be substantiated at a trial. It is important, however, before going into that arena, that the proper legal parameters for entering injunctions against *protected activity* be clearly established in light of the United States Constitution.

inherent equitable power. .... 115 S.Ct. at 2266.

What has happened in the instant case is even worse. The injunction was not issued on the basis of some "public policy". Instead, it was issued on the basis of the state courts' perception that it was obligated to protect a subjective "worship experience" from private encroachment.[15] Even though there was no allegation that the religious worship service had been disrupted or interfered with in any respect. Even though the sole allegation was subjective offense at words. Even though the manner in which the unthreatened and undisturbed religious worship service was protected was the disruption and removal of another church's religious worship service occurring on a public sidewalk. This is "positively alarming" indeed.

D. THE STATE COURTS WRONGFULLY ENJOINED MORE THAN "FOCUSED PICKETING".

This Court has defined "focused picketing" to mean, as a matter of law, only directly in front of the protected building. *Frisby* v. *Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Any linear extension beyond the area directly in front of the building is prohibited by *Frisby* and its progeny. Any injunction which does more than remove lawful, peaceful picketers from the area directly in front of the protected building is

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[15] Although St. David's only claimed a loss of the "worship experience," and the Court of Appeals expressly noted no allegation or evidence of disruption of the worship service, at times the Court of Appeals justified the injunction by stating that it was in place to protect the privacy of the worship service. E.g., "Also, as noted by the trial court in its injunction, an additional important government interest at stake here is the right to worship one's religion without infringement." 921 P.2d at 830. "More broadly stated to apply here, one's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy." 921 P.2d at 830

prohibited. E.g., *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1105 (6th Cir. 1996), *cert. den.*, ---- U.S.----, 115 S.Ct. 2376.

An injunction which defines "focused picketing" as something more is, on its face, legally flawed. That is, even if a privacy interest is properly found in a church building, the government interest which applies is one of protecting privacy only directly in front of the building. The only manner in which the government can carry out that interest is by prohibiting "focused picketing". The injunction in this case prohibited picketing of a distance substantially more than "directly in front of".

The injunction here placed the picketers out of sight, and removed the message from the intended audience. See, e.g., *Horizon Health Center v. Felicissimo*, 282 N.J.Super. 323, 327, 659 A.2d 1387, 1389, *cert. den.*, 142 N.J. 547, 667 A.2d (1995) (requiring injunction be limited so that picketers still had some limited form of expression *in front of* the abortion clinic); *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1663-1664, 39 Cal.Rptr.2d 189 (1995) (upholding very limited injunction only because picketers were not barred from the front of the building, and persons going into abortion clinic still had to go directly past, within a few feet of, the picketers, and picketers had not been exiled to a nonaccessible location).

E. THE STATE COURT INJUNCTION IS NOT CONTENT NEUTRAL AND BURDENS MORE SPEECH THAN NECESSARY TO ACCOMPLISH ANY LEGITIMATE GOVERNMENTAL INTEREST.

The state courts said they relied on this Court's opinion in *Madsen* as justification for the broad injunction entered here. In *Madsen* the picketers acted unlawfully and ignored earlier orders of the state court. No such

circumstances were presented in this case.

The *Madsen* injunction was found to be content neutral, because it imposed "restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order", 114 S.Ct. at 2523. The picketers in *Madsen* engaged in unlawful acts, repeatedly, integral to the picketing act. By contrast, the picketing acts of Westboro's picketers were undisputably lawful. The only behavior St. David's claimed was disruptive was words allegedly uttered by a few of the picketers, and the message of the words and signs. Because St. David's claimed to be having a violent reaction in opposition to these words, the state courts enjoined the picketing to "thwart potential violence", and promised further, "The trial court also expressly stated it was not yet ruling on whether the content of Westboro's message would be further restricted until after hearing evidence on the matter." 921 P.2d at 829; emphasis added. So, with no evidence of unlawful acts or violence, or threats of violence, the state courts enjoined lawful activity, and promised to place further restrictions in the future on the content of Westboro's speech.

Westboro submits that this injunction is not content neutral, and that St. David's entire position rests on its disagreement with the content of Westboro's message. Further, as noted otherwise in this petition, the government has no legitimate interest in protecting the "worship experience" under all these circumstances.

However, even assuming a content-neutral injunction with an underlying legitimate interest, this injunction burdens more speech than necessary, per *Madsen*. In spite of repeated references to *Madsen* to support the injunction, that injunction flies in the face of *Madsen*.

First, the 36-foot buffer zone was upheld (and even then called "debatable", 114 S.Ct. at 2527) in *Madsen* only in the areas, and to the degree, necessary to protect the flow of traffic, protect access and address the picketers' failure to abide by earlier court orders. Not so here. The buffer zone here is not tied to any access issue, because access was never blocked. It is not tied to any traffic flow issue, because there never was such an issue before the state courts. It can not be tied to refusal to abide by earlier orders, because there were no earlier orders. Instead, it is tied directly to taking an offensive message away from the intended audience, which is a thing prohibited in this country. And, in *Madsen* this all followed a 3-day evidentiary hearing.

Second, that portion of the buffer zone which included private property on the back and side of the clinic was not approved by this Court. 114 S.Ct. at 2528. Westboro asked the trial court to reduce the buffer zone to include the northwest corner of the intersection, because it was on the east end of St. David's building, where no parking access or ingress/egress occurred. There is no lawful basis for an injunction which goes this far, no matter what interest is claimed. Further, the injunction broadens to the south, taking in the southwest corner of the intersection, which is across the street from the church building, and a full half block away from the entrance to the bank parking lot. St. David's has no property on the south side of the street, and there is no interest served in broadening the injunction to this area. Except to take the message away from the intended audience.

Third, in *Madsen* this Court's majority struck the "images observable" provision of the injunction, noting that if there were signs which could be interpreted as threats or veiled threats, those specific signs could be prohibited, but could not be the basis for a broad

prohibition. 114 S.Ct. at 2528-2529. Applying this rule of law here, based upon some alleged words by a few picketers, which St. David's does not say were threatening, all of the picketers have been removed by a broad prohibition. Even if St. David's violent reaction to Westboro's alleged words, or words on signs, could be likened to or interpreted as threats, this Court said those specific words could be prohibited -- not all spoken or signed words of the entire group of picketers.

F. IT WAS ERROR FOR THE STATE COURTS TO FIND THAT THE GOVERNMENT COULD BE FORCED TO PROTECT THE "WORSHIP EXPERIENCE" OF ST. DAVID'S CHURCHGOERS FROM ALLEGED PRIVATE INTERFERENCE BY WESTBORO, IN VIOLATION OF THE FREE EXERCISE CLAUSE AND THE ESTABLISHMENT CLAUSE.

The Court of Appeals said that "the right of free exercise would be a hallow one if the government could not step in to safeguard that right from unreasonable interference from another private party". 921 P.2d at 830. Yet there is no allegation that the free exercise of religion was interfered with in this case. The only "right of free exercise" recognized in America is the right found in the Constitution, which by very definition is a right to be protected against by *government* intrusion. Worse, here that right was protected against alleged private intrusion, solely based on disagreement with the words of the private actor.

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 476, 108 S.Ct. 1319, 1339, 99 L.Ed.2d 534 (1988), Brennan, Marshall, Blackman, dissenting, this language is found:

> Should [any group] seek to force the Government to protect their religious practices from the

> interference of private parties, such a demand would implicate not only the concerns of the Free Exercise Clause, but also those of the Establishment Clause as well.

The state courts determined that the religious practices of St. David's are entitled to a higher level of protection than the religious worship service of Westboro occurring on the public sidewalk outside of the building before St. David's religious worship service begins. To carry out this protection, the state courts placed an extreme burden on Westboro's religious worship service, even though Westboro's services occur on public sidewalks, and before St. David's worship services begin. And this imposition has occurred *exclusively* on the basis of subjective, emotive complaints by St. David's about alleged words spoken by picketers on the public sidewalk to St. David's picketers. This finding by the state courts constitutes an extreme violation of the Establishment and Exercise Clauses.

At the same instant the state courts determined (contrary to the Exercise and Establishment Clauses) that they should protect a religious worship service from private interference, they did so by *restricting* Westboro's religious worship service. Westboro's religious worship service is entitled to the same level of protection -- from government, not private, interference -- as St. David's. *Jews of Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1324 (1st Cir. 1993), citing *Murdock v. Pennsylvania*, 319 U.S. 105, 108-109, 63 S.Ct. 870, 873, 87 L.Ed. 1292 (1943).[16]

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[16] The Court of Appeals quoted from and relied on *Kovach v. Cooper*, 336 U.S. 77, 86, 69 S.Ct. 448, 93 L.Ed. 513 (1949). That case briefly suggested that Person A could not go into a church and disturb Person B's religious worship service by preaching a contrary doctrine in the service. E.g., *Action v. Gannon*, 450 F.2d 1227 (8th Cir.

In *Lyng v. Northwest Indian Cemetery Protective Association, supra*, the majority said that governmental interference could not be prohibited solely on the basis of a claim that the government's actions interfered with the spiritual development of a group. Yet in this case, the state courts placed restrictions on private actions based solely upon a subjective claim of unsubstantiated interference with the "worship experience".

By this reasoning, a person need merely come to a court and say, "On such-and-such a date, I read or heard some words of a religious nature with which I strongly disagreed, and later when I was trying to engage in religious worship, I was so distracted by those words I heard or saw that I could not worship," and that court would intervene, and silence the speaker of the offensive words. It is difficult to imagine a greater trespass on the Exercise, Establishment and Free Speech Clauses.

G. IT WAS ERROR FOR THE STATE COURTS TO TREAT WESTBORO'S PICKETING AS A NUISANCE, AND THEREBY ALLOW THE IMPOSITION OF CIVIL LIABILITY AGAINST LAWFUL, PROTECTED ACTIVITY, ESPECIALLY IN THE ABSENCE OF ANY ALLEGATION OR EVIDENCE OF ANY VIOLENT OR UNLAWFUL ACTIONS BY WESTBORO'S PICKETERS, AND BASED SOLELY ON A SUBJECTIVE, EMOTIVE CLAIM THAT WESTBORO'S MESSAGE INTERFERED WITH THE "WORSHIP EXPERIENCE".

This Court has held that civil liability may not be imposed on the basis of protected activity, *even in the*

1971) (proper to enjoin black citizens from entering cathedral and disrupting church as part of civil rights demonstration). No Westboro picketer ever tried to disrupt, or in fact disrupted, St. David's religious worship service, or to preach a different doctrine in the service. That case and its progeny have no application here.

face of some isolated acts of violence. In *N.A.A.C.P. v. Claiborne*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) the United States Supreme Court set aside judgments against participants in a boycott and a civil rights organization which had been rendered on behalf of white merchants who claimed to have lost business and been damaged by the boycott. The purpose of the boycott was to secure compliance by civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing. The record in that case indicated that some isolated acts of violence had occurred (e.g., shots fired at a house, bricks thrown through a windshield), largely directed toward black persons who did business with the merchants being boycotted.

The rule of law derived from that case is that civil liability can not be imposed on protected activity. In this case, civil liability -- in the form of a threshold finding of private nuisance -- has been imposed on protected religious picketing. Worse, Westboro's picketing was labeled as unlawful strictly on the basis of contentions by persons offended by their words that <u>they</u> might become violent, which is contrary to the rule of law which prohibits the silencing of speech because of threats of violence by the listener.

There is no allegation that Westboro's picketing acts are unlawful, but it is the picketing that forms the basis for civil liability. Surely if actual acts of violence by some of the picketers in *Claiborne* can not justify imposition of civil liability, allegedly offensive spoken words during public debate can not form the basis for the imposition of civil liability against the picketing at issue here.

Treating the lawful, protected, religious picketing

of Westboro as a private nuisance, even on a threshold finding, and particularly in the absence of any finding that any picketing acts or extra-picketing-speech was unprotected, wrenches the Constitution beyond recognition. Further, treating the words of some of Westboro's members as a nuisance, in the face of an express supposition that the words are protected, is "flatly wrong", *Winfield v. Kaplan*, ---- U.S. ----, 114 S.Ct. 2783, 129 L.Ed.2d 894 (1994), Scalia, Kennedy & Thomas, dissenting.[17]

H. IT WAS ERROR FOR THE STATE COURTS TO AFFORD WESTBORO'S SPEECH LESS PROTECTION BECAUSE CHILDREN WERE ALLEGEDLY PRESENT.

The state courts afforded Westboro's speech less protection because children were allegedly present. Recall that the infrastructure of the Court of Appeals' opinion was that Westboro's speech was protected.

This Court has said that the government can assert an interest in shielding minors from indecent materials as part of their interest in safeguarding the psychological well-being of a minor. Those statements have been made in cases where the potential harm to children from material was evident, such as material promoting and displaying sexual performances by children, dial-a-porn with pornographic telephonic messages and so forth. Application of this rule of law is completely inappropriate where the material subject to coverage, and being treated and prohibited as "indecent", "may contain valuable literary, artistic or educational information of value to

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[17] There, as here, a preliminary injunction was issued on a threshold finding of private nuisance based upon picketing which included words which the North Carolina state courts said could be "interpreted as threatening". *Kaplan v. Prolife Action League of Greensboro*, 111 N.C.App. 1, 8, 431 S.E.2d 828, 831 (1993).

older minors as well as adults". *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 852 (E.D.Pa. 1996).

> The Supreme Court has held that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 [95 S.Ct. 2268, 45 L.Ed.2d 125] (1975) (citations omitted). In *Erznoznik*, the Court rejected an argument that an ordinance prohibiting the display of films containing nudity at drive-in move theaters served a compelling interest in protecting minors passerby from the influence of such films. The Court held that the prohibition was unduly broad, and explained that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14. As Justice Scalia noted in *Sable* [*v. Communications of California, Inc. v. Federal Commications Commission*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)], "[t]he more pornographic what is embraced within the ... category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 492 U.S. at 132 (Scalia, J., concurring). It follows that where non-pornographic, albeit sexually explicit, material also falls within the sweep of the statute, the interest will not be as compelling. *Id.*

The words of Westboro's picketers are not, as a matter of law, pornographic or obscene. The claim here is that some crude references to the physical act at issue

in this debate were offensive, and allegedly on a few occasions uttered while minors were in the vicinity. The use of a crude description of the homosexual act, in the midst of a debate about the response of society and churches to homosexuality, is beyond the pale of anything the law would call pornographic, obscene or unprotected.

The rule of law applied by the state courts to afford Westboro's public religious speech less protection has no proper application in this case. A great disservice is done to the Constitution when protected public debate on a vital issue is labeled pornography by dissenters, and on the basis of that label stripped of its protection. What would the state courts do with the graphic displays of how to use a condom to avoid AIDS which permeate the Internet? Or with the depictions of abortions used by pro-life groups to discourage women from having abortions? By the device of labeling such things "indecent" all public debate on all current critical issues could be silenced. If it can be done outside of a church building where debate is ongoing inside about homosexuality, it can be done anywhere!

Conclusion

In *Lawson v. Murray*, *supra*, Justice Scalia concluded his concurring opinion by saying:

> .... I think it of vital importance that *Madsen* quickly be limited to what it said, rather than what it did. ..... [C]larification of *Madsen* is ... unlikely to occur in another case involving the currently disfavored class of antiabortion protesters. .... 115 S.Ct. at 2267-2268.

This is the case in which *Madsen* should be clarified and limited. The Kansas state courts went well beyond what *Madsen* authorized. Speech which has been declared

protected has been restricted by a sweeping injunction. *Madsen* presented a case of ongoing unlawful picketing acts, and the injunction was only entered after failed efforts to contain the unlawful activity. The standard for a remedial injunction which this Court upheld has been over-and-mis-applied to lawful activity. Further, in the doing, a church building out of which a public debate has emanated has been afforded the same level of protection as a residence, or a medical clinic where life-threatening medical procedures occur.

This country is in the throes of a national debate about homosexuality. The churches in this country are at the forefront and center of that discussion. Many of the major denominations, including the Episcopalians, are leaving the Bible position on this subject. As an illustration, on October 12, 1996, as part of the Names Project-The Quilt In The Capitol, a group called the National Episcopal AIDS Coalition (NEAC) is having a "National Retreat". The group's logo: "Our Church Has AIDS". Speakers at this event will include Bishop John Spong, Martin Smith, Ed Browning, Kelly Brown-Douglas and Bill Countryman. These speakers will attempt to influence the nation on the subject of homosexuality and the related subject of AIDS. However one may characterize these speakers' positions on these issues, it would be inconceivable to suggest that other groups, including religious groups, should not have the freedom to lawfully picket, or otherwise publicly express a contrary view at this event.[18] This, however, is the precise nature of the injunction issued by the state courts.

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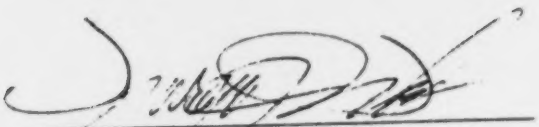
[18] In fact, Westboro picketers will picket this event, as well as a number of the other events scheduled in connection with the Names Project. Events that will be picketed include the National AIDS Candlelight March, "Rage Against the Dying of the Light," and "PFLAG's 15th Annual International Conference," all scheduled to occur in Washington the same weekend as this Episcopalian group's retreat.

Westboro respectfully asks that this Court review the injunction.

Respectfully submitted.



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Supreme Court, U.S.
FILED

No. 96 582 OCT 11 1996

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1996

Westboro Baptist Church, Inc.,
Petitioner

vs.

St. David's Episcopal Church

ON PETITION FOR WRIT OF CERTIORARI TO THE KANSAS COURT OF APPEALS

APPENDIX TO: PETITION FOR WRIT OF CERTIORARI

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A. ORDER OF THE KANSAS COURT OF APPEALS OF JUNE 21, 1996

COURT OF APPEALS
FILED JUNE 21, 1996
STATE OF KANSAS

No. 73,928

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ST. DAVID'S EPISCOPAL CHURCH,
Appellee,

v.

WESTBORO BAPTIST CHURCH, INC.,
Appellant.

SYLLABUS BY THE COURT

1.

Depending upon the facts of a given case, a temporary restraining order may ripen into a temporary injunction.

2.

There are four prerequisites to obtain a temporary injunction: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the

opposing party; and (4) a showing that the injunction, if issued, will not be adverse to the public interest.

3.

There are four requirements for recovery on a private nuisance claim: (1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) there was some interference with the use and enjoyment of the land of the kind intended, although the amount and the extent of that interference may not have been anticipated or intended; (3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial; and (4) the interference was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.

4.

In evaluating a content-neutral injunction, the proper test is whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.

5.

Under the present facts, the government has an interest in protecting a place of worship from focused picketing.

6.

Depending upon the context, the government may have an interest in protecting children from objectionable speech beyond the interest it has in protecting adults from the same speech.

Appeal from Shawnee District Court; MICHAEL A. BARBARA, retired judge, assigned. Opinion filed June 21, 1996. Affirmed in part, reversed in part, and remanded.

Margie J. Phelps and *Chris R. Davis*, of Phelps - Chartered, of Topeka, for appellant.

Jerry R. Palmer, of Palmer & Lowry, and *Alan V. Johnson*, of Sloan, Listrom, Eisenbarth, Sloan & Glassman, of Topeka, for appellee.

Before BRAZIL, C.J., LEWIS, J., and TOM MALONE, District Judge, assigned.

BRAZIL, C.J.: Westboro Baptist Church (Westboro) appeals from what it considers a temporary injunction by the trial court. St. David's Episcopal Church (St. David's) filed a petition based in nuisance seeking to enjoin Westboro from engaging in focused picketing activity within certain distances of St. David's property shortly before, during, and shortly after any religious event at St. David's. The trial court issued a temporary restraining order (TRO) and an amended TRO which granted most of the restriction sought by St. David's. After the court denied Westboro's motion to vacate or to alter, amend, or modify the TRO, Westboro perfected this appeal. Westboro's main contention on appeal is that the court erred in issuing what it considers, in effect, a temporary injunction. Westboro also challenges an order which denied its motion for a change of judge and challenges the trial court's failure to require a

bond before issuing the injunction.

Because a full evidentiary hearing has yet to be held in this case, the facts have been taken from the pleadings and affidavits relative to each of the respective appealed-from orders.

St. David's maintains a house of worship on the northwest corner of 17th and Gage streets in Topeka. Since about March 1992, Westboro has conducted demonstrations and picketing activities on each of the four corners of that intersection.

On June 13, 1994, St. David's filed its petition alleging that Westboro's activities constituted a private nuisance and requesting a temporary injunction against Westboro and, ultimately, a permanent injunction. The petition defined focused picketing as "standing, sitting or walking at a deliberately slow speed or walking repeatedly around Plaintiff's house of worship by any person governed by the order, while carrying a banner, placard or sign." The petition defined a religious event as "any scheduled worship service (5:30 p.m. Saturday; 8:30 a.m. and 10:30 a.m. Sundays), and any wedding, funeral, memorial service for the dead or the observation of other sacraments, rituals, or celebrations which are announced by a sign posted within 10 feet of the St. David's sign on 17th Street which announces its ordinary services." The petition further sought to restrain Westboro "from making any noise by singing, chanting, shouting or yelling, that can be heard through the walls of the church during any religious event." St. David's filed with its petition affidavits from nine persons associated with St. David's

describing Westboro's picketing activities and the alleged harm caused by Westboro.

On July 1, 1994, Westboro filed a notice of removal to the United States District Court for the District of Kansas. The United States District Court granted St. David's motion to remand, finding that, under the well-pleaded facts of the original petition, the court lacked subject matter jurisdiction. That judgment was filed in the state district court on July 18, 1994.

On July 18, 1994, St. David's filed a motion for a TRO. The motion was based in part on St. David's belief that Westboro's attempt to remove the case was in bad faith and had caused an inequitable delay in the state court proceedings. The trial court had scheduled a hearing on the original petition to be held July 12-13, 1994, but later continued the hearing upon Westboro's removal notice. In its motion, St. David's requested the TRO "[f]or purposes of good public policy and the orderly and efficient administration of justice" because Westboro's attempt at removal had delayed the injunction hearing to the detriment of St. David's rights.

The parties and the court apparently held a telephone conference on July 19, 1994, concerning St. David's motion for a TRO. At that time, the court stated it would allow the parties to submit any support for their positions but that it would take some action on the matter on July 21, 1994.

At 10:51 A.M. on July 21, 1994,

Westboro filed a response to St. David's motion and a motion for judgment on the pleadings and to dismiss. The response contained 13 supporting affidavits and numerous exhibits, amounting to a 245-page filing.

At 2:14 P.M. on July 21, 1994, the court issued a TRO against Westboro "pending a hearing on a temporary injunction." The order restrained Westboro:

> "1. From engaging in focused picketing of plaintiff on public property within 36 feet to the east, within 36 feet to the west, within 36 feet to the north and within 215 feet to the south of the church property owned and used for religious purposes by St. David's (the property located on the northwest corner of 17th and Gage) from a period beginning one-half hour before and ending one-half hour after a religious event. The distance is to be measured from all points along the property line of the church's property.
>
> "2. That 'focused picketing' means picketing by driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around plaintiff's house of worship by any person governed by the Order, while carrying a banner, placard, or sign. 'Religious event' means any scheduled worship service 5:30 p.m. Saturday, 8:00 a.m. and 10:30 p.m. Sundays, and any wedding, funeral, memorial service for

the dead, or the observation of other sacraments, rituals, or celebrations which are announced by a sign posted within ten feet of the St. David's sign on 17th Street which announces its ordinary services.

"3. Defendant and the others described above likewise will be restrained from making any noise by signing [sic], chanting, shouting or yelling, that can be heard through the walls of the church during any religious event.

"4. The Sheriff of Shawnee County, Kansas is directed to personally serve a copy of this Temporary Restraining Order on the Reverend Fred W. Phelps, as resident agent and personally as the pastor of defendant Westboro Baptist Church at 3701 West 12th Street, Topeka, Kansas, 66604, and upon any and all persons engaged in picketing or carrying or displaying any signs or placards at St. David's Episcopal Church at 3916 West 17th Street, Topeka, Shawnee County, Kansas."

On July 25, 1994, Westboro filed a "MOTION TO VACATE OR TO ALTER, AMEND OR MODIFY TEMPORARY RESTRAINING ORDER & MOTION FOR ORDER REQUIRING PLAINTIFF TO PAY FOR AND PROVIDE A SURVEY & TO MARK THE BUFFER ZONE & MOTION FOR IMMEDIATE HEARING." Among other things, the motion alleged judicial bias by the

trial court in issuing the TRO. This allegation involved the trial court's apparent signature on a petition which had run in the local Topeka newspaper more than a year earlier. This petition, apparently aimed at Westboro's crusade against homosexuality, stated:

> "We the undersigned, offer witness of our belief that all people have the right to live in dignity, in safety and in privacy, regardless of age, gender, race, ethnicity, religious preference or sexual orientation. We embrace love rather than hate; safety rather than endangerment, respect rather than harassment. Our commitment to these beliefs compels us to create a community that promotes these values."

Following a hearing held August 9, 1994, the court denied Westboro's motions of July 25, 1994.

On July 27, 1994, St. David's moved the court to amend its TRO. According to St. David's motion and accompanying affidavit, after the original TRO was issued, Westboro had continued to demonstrate at the places and times prohibited by the original TRO but did so without carrying banners, placards, or signs. Westboro filed a response opposing the motion. The court issued an "AMENDED TEMPORARY RESTRAINING ORDER" on July 29, 1994. The only substantive difference in this amended TRO involves paragraph 2 of the order which redefines focused picketing as "picketing *or*

demonstrating by driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around Plaintiff's house of worship by and person governed by the Order, *with or without* a banner, placard, or sign." (Emphasis added.)

On August 14, 1994, Fred W. Phelps, Westboro Pastor, conducted a broadcast on a Topeka radio station which contained comments alleging misconduct by the trial judge, Michael A. Barbara. On September 15, 1994, a FAX "News Release" from Westboro contained derogatory comments and depictions of Judge Barbara. Based upon these events, and based upon comments by Margie Phelps, Westboro trial counsel during the September 20, 1994, hearing on Westboro's motion for a change of judge, contempt proceedings were ultimately filed against Fred Phelps and Margie Phelps. As a result, the court found Fred Phelps in indirect contempt of the court and Margie Phelps in direct contempt of the court. This decision was announced on the record by the court on october 19, 1994, and journalized December 19, 1994. Those contempt citations are the subject of a separate appeal in this court.

As a result of the attention devoted to the contempt proceedings, considerable delay occurred with regard to the TRO. During the pendency of the contempt proceedings, the Kansas Supreme Court assigned a judge to determine the legal sufficiency of Westboro's affidavit to disqualify Judge Barbara. On October 17, 1994, the judge concluded the affidavit was legally insufficient.

On November 28, 1994, Westboro filed a

motion which, among other things, requested the court to expedite the hearing on the temporary injunction and opposed consolidation of the temporary injunction hearing with the trial on the merits.

After a hearing held December 19, 1994, the court, on the record, denied all of Westboro's outstanding motions. The journal entry of the court's decision was not filed until March 16, 1995. At the December 19, 1994, hearing, the court and the parties set April 10, 1995, as a tentative date for a consolidated trial on the temporary and permanent injunctions.

On March 9, 1995, St. David's moved to file a first amended petition. The first amended petition contained the original nuisance count and also second count alleging service mark infringement by Westboro for depicting St. David's church sign in its signs, placards, and banners. On March 28, 1995, the court granted St. David's motion over Westboro's objection.

On April 13, 1995, Westboro filed a notice of appeal from the TRO, the amended TRO, and the Court's denial of Westboro's motions to vacate or amend those TROs.

On May 2, 1995, this court ordered the parties to show cause why the appeal should not be dismissed as no temporary injunction had yet been ordered by the trial court. After noting the responses of the parties, this court retained the appeal on May 31, 1995.

Westboro first contends the court failed to afford it an adequate opportunity to be heard before the temporary injunction was issued.

K.S.A. 60-905(a) states: "No temporary injunction shall be granted until after reasonable notice to the party to be enjoined and an opportunity to be heard." Absent unusual circumstances, a hearing is required before a temporary injunction restraining First Amendment rights may be issued. *State v. Alston*, 256 Kan. 571, 579-80, 887 P.2d 681 (1994).

Westboro complains it was not provided a formal hearing before the July 21, 1994, order was issued. Underlying this argument is Westboro's position that the July 21, 1994, order was, in fact, a temporary injunction. We disagree. Although the TRO, as amended, eventually ripened into a temporary injunction for reasons stated below, on July 21, 1994, the order that issued was a TRO, and Westboro was provided more due process than normally is provided for a TRO. Westboro also maintains that, although it had submitted substantial evidence to the court in the form of affidavits, exhibits, and photographs prior to the July 21, 1994, order, the court could not have given adequate consideration to this evidence given the court's time constraints. Again, we disagree.

Westboro responded by providing the court with a 240-page filing. In its memorandum in support of the TRO, the court stated it had reviewed Westboro's filing, although it had not reviewed a videotape which was also submitted by Westboro. (The videotape is not included in the record on

appeal.)

Although not given an opportunity to put on witnesses in support of its filing, Westboro has admitted on appeal that a hearing would not have furthered its position in any material respect. According to Westboro's response to the show cause order, "[a]ny further evidentiary hearing would do nothing but build on or fill in the current positions of the parties. No new issues, factual or legal, will be presented." Given Westboro's position that a hearing was unnecessary, we will not consider its argument that the lack of a hearing violated its due process.

For these same reason, and because of the length of time in which the TRO or an amended version has been in effect, we conclude that the TRO had ripened into a temporary injunction by the time that this appeal was filed. See *City of Wichita v. Home Cab Co.*, 151 Kan. 679, 684-85, 101 P.2d 219, *cert. denied* 311 U.S. 677 (1940); *Bowman v. Hopper*, 125 Kan. 680, 682, 265 Pac. 743 (1928).

Westboro next contends the court erred in issuing the temporary injunction.

There are four prerequisites to obtain a temporary injunction: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, will not be adverse to the public interest.

Wichita Wire, Inc. v. Lenox, 11 Kan.App.2d 459, 462, 726 P.2d 287 (1986). "A trial court's decision to grant or deny an injunction is discretionary and will not be disturbed on appeal absent a showing of an abuse of discretion. [Citation omitted.] The burden is on an appellant to show that the trial court abused its discretion by issuing the temporary injunction." 11 Kan.App.2d at 462.

Substantial likelihood of prevailing

The question of whether St. David's had a substantial likelihood of prevailing on its nuisance claim is clouded by the procedural posture of this case. In its TRO, the trial court made limited findings concerning the potential for violence at the picketing locality and expressly deferred the issue of whether Westboro's picketing involved unprotected speech. Although the parties assure this court that a full hearing on the temporary injunction would not have contributed to the evidentiary record, the fact remains that the trial court has not had the opportunity to weigh the evidence and make the factual findings which are essential to this court in ruling on these difficult constitutional issues. In determining whether St. David's had a substantial likelihood of prevailing on its nuisance claim, we, as an appellate court, do not weigh the facts and, therefore, must consider the facts drawn from St. David's petition viewed in the light most favorable to St. David's.

The merits of St. David's petition are based upon a claim of private nuisance. In *Williams v. Amoco Production Co.*, 241 Kan. 102, 117, 734 P.2d 1113 (1987), our Supreme Court, citing Prosser and Keaton on Torts, announced four requirements for

recovery on a private nuisance claim: (1) The defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) there was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended; (3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial; and (4) the interference was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.

Westboro argues there is nothing in the record to suggest it had knowledge that its picketing activities were causing harm to St. David's.

> "Occasionally, the defendant may act from a malicious desire to so harm for its own sake; but more often the situation involving a private nuisance is one where the invasion is intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow." Prosser and Keeton on Torts § 87, pp. 624-25 (5th ed. 1984).

Certainly, if Westboro were found to be employing speech which is not constitutionally protected--fighting words, obscenity, and the like--then it seems it should have known that harm to St. David's was substantially certain to follow from its picketing activity and St. David's would have a substantial

likelihood of prevailing on the merits. Again, however, because the trial court has not yet addressed the issue of whether Westboro was employing unprotected speech in its picketing activity, this court is not in a good position to determine this issue.

As to the trial court's finding that there was a threat of physical violence at the picketing locality, the affidavits filed with the petition show several members of St. David's expressed concern for the physical safety of themselves and/or their children upon entering or leaving church services. The question, however, is (1) whether Westboro's conduct was unreasonable, and (2) if so, whether, on balance, the gravity of harm to St. David's outweighed the utility of Westboro's conduct. See *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 22, 431 S.E.2d 828, *rev. denied* 335 N.C. 175 (1993), *cert. denied* 129 L.Ed.2d 894 (1994)(discussing nuisance in the context of an injunction which prevented anti-abortion activists from picketing within a specified distance of the residence of a doctor who performed abortions).

Westboro argues its actions were not unreasonable because of St. David's efforts to counter-picket at the site. The *Kaplan* court, in discussing whether an interference with the use and enjoyment of one's land is unreasonable, stated:

> "'Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. . . . Determination of the gravity of the harm involves consideration of the extent and character

> of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.'" 111 N.C. App. at 22 (quoting *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787 [1977]).

Westboro asserts that, because St. David's engaged in counter-picketing activities, it failed to minimize any harm by Westboro. Westboro also claims that St. David's actions underscored the suitability of the locality for picketing.

The record shows that Westboro conducted its picketing activities for nearly a year before St. David's responded with picketing of its own. In addition, although St. David's may have engaged in picketing activity at some point, at issue in this case is the *manner* in which *Westboro* conducted its picketing activity at the locality. The affidavits before the trial court show that Westboro picketed in such a manner that the religious worship of St. David's was infringed by the fear held by St. David's members that physical violence might occur. The trial court found these

circumstances particularly escalated in light of the fact that children accompanied their parents to the religious services. The trial court's findings are supported by the limited record that is before this court. Thus, there is substantial evidence to find that the gravity of the harm to St. David's outweighed the utility of Westboro's conduct. If the trial court finds that Westboro has employed constitutionally unprotected speech as well in its picketing activities, then this issue will weigh even more in St. David's favor.

In short, the affidavits filed with St. David's petition show there was an interference with the use and enjoyment of its property that was intentional, substantial, and unreasonable. Based upon these affidavits, St. David's has a substantial likelihood of prevailing on its nuisance claim. "'It is only necessary that plaintiffs establish a reasonable probability of success, and not an "overwhelming" likelihood of success, in order for a preliminary injunction to issue.'" *Wichita Wire*, 11 Kan.App.2d at 463-64 (quoting *Atchison, T. & S.F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 [10th Cir. 1981]).

Irreparable injury

Westboro does not specifically address this issue. St. David's states it has been irreparably injured through the loss of existing members, the loss of potential members, the decreased worship experience of some of its members, reputational injury, and injury from the potentially violent atmosphere of the picketing locality. The nature of these injuries is such that St. David's does not have "a full, complete, and adequate remedy at law through recovery of

calculable money damages." *Wichita Wire*, 11 Kan.App.2d at 465. Westboro has failed to show error on this point.

Threatened injury outweighed damage

Westboro contends the temporary injunction unduly infringes its First Amendment rights of freedom of speech and religion.

The parties agree to the application of the recent United States Supreme Court decision in *Madsen v. Women's Health Center*, 512 U.S. ___, 129 L.Ed.2d 593, 114 S.Ct. 2516 (1994), but dispute the effect of applying *Madsen* to the present case. In *Madsen*, the Court addressed the constitutionality of an injunction which created a buffer zone around an abortion clinic and around the residences of clinical staff. The Court began by addressing whether the injunction restricted the content of the protesters' speech:

> "Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' [Citations omitted.] We thus look to the government's purpose as the threshold consideration. . . . [T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based." 129 L.Ed.2d at 606.

The express purpose of the temporary injunction in this case was to thwart potential violence

around St. David's property during specific times of the day when prior encounters between the two groups occurred. The trial court also expressly stated it was not yet ruling upon whether the content of Westboro's message would be further restricted until after hearing evidence on the matter. The injunction imposed in this case, therefore, is content neutral.

In evaluating a content-neutral injunction, *Madsen* held that the proper test is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." 129 L.Ed. 2d at 608. In so holding, the Court rejected the application of a strict scrutiny analysis to evaluate a content-neutral injunction. 129 L.Ed. 2d at 608-09.

Madsen further upheld a combination of government interests used by the Florida Supreme Court as "quite sufficient to justify an appropriately tailored injunction to protect them." 129 L.Ed.2d at 610. Many of those interests apply in the present case as well, including the State of Kansas' strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens. See 129 L.Ed.2d at 609. Also, as noted by the trial court in its injunction, an additional important government interest at stake here is the right to worship one's religion without infringement. See Kan. Const. Bill of Rights, Section 7.

In addition to the government interest cited in *Madsen*, does the government have a further interest in protecting the property at issue because it is

a place of religious worship for the members of St. David's?

The recent Supreme Court cases involving focused picketing have noted a special government interest in protecting residential privacy to uphold restrictions upon the focused picketing of an individual's home. See *Madsen*, 129 L.Ed.2d at 614; *Frisby v. Schultz*, 487 U.S. 474, 484-85, 101 L.Ed. 2d 420, 108 S.Ct. 2495 (1988). In *Madsen*, the court went even further and upheld the Florida Supreme Court's finding that the government had an interest in protecting an abortion clinic's property from targeted picketing because targeted picketing threatens both the psychological and physical well-being of the clinic's patients. 129 L.Ed. 2d at 609-10.

After noting the government interest in protecting residential privacy which has been upheld by the United States Supreme Court, the trial court in this case ruled that one's place of worship "would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment."

We agree with the trial court and find that, in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well. This interest does not flow directly from the right of free exercise of religion found in the First Amendment to the United States Constitution and § 7 of the Bill of Rights of the Kansas Constitution. Those constitutional provisions

safeguard the free exercise of religion from governmental interference. However, the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party.

In discussing the time, place, and manner restrictions that may be placed upon free speech, the United States Supreme Court has noted that "religious worship may not be disturbed by those anxious to preach a doctrine of atheism." *Kovacs v. Cooper*, 336 U.S. 77, 86, 93 L.Ed. 513, 69 S.Ct. 448 (1949). More broadly stated to apply here, one's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy.

The trial court here also found that the temporary injunction was warranted because of harassment and threats of violence and injury surrounding the picketing of St. David's by Westboro. The court reasoned the climate was particularly volatile in light of the fact that children were accompanying their parents to the religious services at St. David's and that these parents would tolerate less harassment when accompanied by their children than otherwise. The court also noted that the constitutional limits of Westboro's speech would be lessened given the fact that children were routinely part of the audience which was subjected to Westboro's speech. However, the court deferred a determination of whether the speech employed by Westboro fell within the First Amendment's protection until an evidentiary hearing could be held.

Because an evidentiary hearing has not

been held nor findings made, this court is not in a position to determine whether Westboro's speech was constitutionally protected. However, we can address the legal question raised by the trial court: Is the speech employed by Westboro in its focused picketing *afforded less constitutional protection* because children routinely are part of the audience?

St. David's cites three United States Supreme Court cases to support its position that the government has an added interest in protecting children from objectionable speech: *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L.Ed.2d 549, 106 S.Ct. 3159 (1986), *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L.Ed.2d 1073, 98 S.Ct. 3026, *reh. denied* 439 U.S. 883 (1978), and *Ginsberg v. New York*, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274, *reh. denied* 391 U.S. 971 (1968). In general, these cases show that, depending upon the context, the government does have an interest in protecting children from objectionable speech beyond the interest it has in protecting adults from the same speech.

Fraser and *Ginsberg* are less helpful to resolve the current issue because, unlike the audience which is subject to Westboro's speech in the present case, the audiences subject to the speech in *Fraser* and *Ginsberg* were solely or primarily children.

In *FCC*, the Court recognized a government interest in protecting minors from exposure to vulgar or offensive spoken language. The case arose following the broadcast of comedian George Carlin's 12-minute monologue entitled "Filthy Words." The FCC issued an order condemning the

local station which broadcast the monologue, and the order was challenged in court. On appeal, the United States Supreme Court, in considering the constitutionality of the FCC's order, addressed "whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content." 438 U.S. at 745.

The Court noted that the patently offensive words at issue in *FCC* were "not entirely outside the protection of the First Amendment," 438 U.S. at 746, but nonetheless "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." 438 U.S. at 747.

The Court upheld the FCC order as constitutional and, in doing so, relied upon two basic reasons. First, the Court found that the nature of the broadcast medium was such that offensive material "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. Second, the court found broadcasting "uniquely accessible to children," 438 U.S. at 749, in contrast to other forms of offensive expression which may be withheld from children without restricting the expression at its source, *e.g.*, indecent literature and movies.

Although the *FCC* Court emphasized that its holding was a narrow one, the very same reasons for upholding the restriction of speech in *FCC* are present here. The attending of worship services by

members of St. David's involves a public and private exercise--public in the sense that the members must naturally travel through and amid public property to get to their church (*i.e.,* the setting giving rise to the current lawsuit involves a traditional public forum), and private in the sense that the members are engaging in private devotion (*i.e.,* as already recognized earlier, there is a government interest in protecting the privacy of St. David's place of worship).

In addition, the times of day affected by the trial court's injunction--immediately before, during, and immediately after a religious event--are times when children are routinely part of the audience which is subject to Westboro's verbal barrage. As in *FCC*, although there is language and expression which Westboro could lawfully use where adults alone made up the audience, the same cannot be said where the audience involves a mixture of adults and children. Importantly, as in *FCC*, the audience cannot be otherwise separated out so that the children are not subject to the objectionable speech, absent requiring the children to remain home, which would be an obvious assault upon their free exercise of religion.

In short, the trial court did not err when it found that the standard for judging the constitutionality of Westboro's speech is such that it may be narrowly tailored to suit both adults and children during the effective times of the injunction.

On the whole, the combination of these government interests and those cited in *Madsen* is sufficient to justify an appropriately tailored injunction to protect them.

Throughout is brief, Westboro challenges some of these justifications by the trial court, stating that there was no threat of violence and no obstruction of vehicle or pedestrian traffic. This court's retention of this appeal was largely based on Westboro's assurance in its response to the show cause order that further hearings by the trial court would not contribute to the evidentiary record now before the court. Thus, Westboro's opportunity to challenge the trial court's findings concerning the government interests at stake in this case have been foreclosed by its own desire for an appeal of the trial court's order.

The next question is whether the injunction burdens no more speech than necessary to serve the government interests at stake. The trial court imposed a buffer zone within which Westboro is prohibited from engaging in focused picketing from a period beginning one-half hour before and ending one-half hour after a religious event. The zone extends 36 feet to the east, 36 feet to the west, 36 feet to the north, and 215 feet to the south of St. David's church property.

Westboro argues that, even if the injunction is upheld, the trial court's buffer zone burdens more speech than is necessary to carry out the government interests at stake. St. David's requests this court to reform the trial court's buffer zone to extend 100 feet from its property in all directions and to impose other restrictions not imposed by the trial court.

Unfortunately, because of the posture of this case and the lack of findings by the trial court, it

is impossible for this court to determine whether the court's buffer zone requires reformation. The cases cited by the parties which have upheld various buffer zone distances, while relevant, are not determinative in any way because injunction cases, like the present one, are extremely fact specific depending upon the physical nature of the area involved. What is desperately needed in this case is an evidentiary hearing to determine whether the buffer zone falls short of, satisfies, or exceeds its stated purpose. The parties would apparently have this court take judicial notice of what has been going on at 17th and Gage Streets for the past 1 and 1/2 years.

Westboro also fails to explain why the other avenues of expression left open by the injunction as it currently exists--the limited picketing allowed by the order, picketing elsewhere, mailings, leaflets, etc.--give it insufficient other means to communicate its message. Based upon the record that is before this court, we affirm the court's buffer zone with specific directions on remand that, if the court decides to impose a permanent injunction, it should make findings concerning the appropriateness of whatever distances the court ultimately imposes.

We do have a problem with the court's order proscribing noise contained in the third paragraph of its injunction order. The United States Supreme Court has upheld as constitutional some noise restrictions related to picketing activity. See *Madsen*, 129 L.Ed.2d at 612. As Westboro points out, however, there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was

interfering with the worshipping by St. David's. Although the petition did request an injunction on such noise, St. David's has yet to provide the trial court, or this court, with any basis for such an injunction. On the present record, we reverse the trial court's order enjoining noise by Westboro.

As a final matter under this issue, Westboro would like for this court to resolve the question of whether a court can enjoin picketing outside of a church on public sidewalks. St. David's argues that this issue was not considered by the trial court and should not be considered on appeal.

Westboro's arguments on this issue seem to presume that its speech is constitutionally protected, an issue expressly left open by the trial court. Any ruling by this court on this issue, therefore, would be advisory in nature.

Adverse to public interest

Westboro makes no showing that the court's order is adverse to the public interest other than its general arguments concerning preservation of freedom of speech. As noted already, however, injunctions of picketing activity have often been upheld against First Amendment challenges where the burden on the speech is outweighed by the need for protection from the picketing activity. See, *e.g., Madsen v. Women's Health Center,* 129 L.Ed.2d 593, *Kaplan v. Prolife Action League of Greensboro*, 111 N.C.App. 1, 431 S.E.2d 828, *rev. denied* 335 N.C. 175 (1993), *cert. denied* 129 L.Ed.2d 894 (1994). In these types of cases, the public's interest is better served when the freedom to speak is not completely unfettered.

In sum, the four prerequisites for a temporary injunction having been met, Westboro has failed to meet its burden of showing the trial court abused its discretion by issuing the temporary injunction.

Next, Westboro contends the assigned judge erred in ruling that the affidavit supporting its motion for a change of judge was legally insufficient. The assigned judge denied a similar motion in the portion of this case that involves the contempt proceedings against Fred and Margie Phelps.

The sufficiency of an affidavit filed pursuant to K.S.A. 20-311d is a matter of law over which this court has unlimited review. *State v. Clothier*, 20 Kan.App.2d 994, 995, 894 P.2d 257 (1995).

As a preliminary matter, St. David's argues Westboro failed to timely appeal the order which ruled that its affidavit was insufficient. Although St. David's suggests that the order denying the motion to change judge was immediately appealable, it provides no authority for this proposition. There was no certification of Westboro's change of judge claim under K.S.A. 60-254(b). Westboro's appeal from this order is as timely as the rest of the appeal.

Westboro argues the district court erred in ruling the affidavit failed to show that Judge Barbara lacks impartiality. Westboro is most concerned about Judge Barbara's signature on a petition which appeared in the local Topeka newspaper over a year before the filing of the present

lawsuit. The petition, restated here for convenience, states:

> "We, the undersigned, offer witness of our belief that all people have the right to live in dignity, in safety and in privacy, regardless of age, gender, race, ethnicity, religious preference or sexual orientation. We embrace love rather than hate; safety rather than endangerment, respect rather than harassment. Our commitment to these beliefs compels us to create a community that promotes these values."

In *State v. Griffen*, 241 Kan. 68, Syl. ¶ 5, 734 P.2d 1089 (1987), the court announced:

> "The standard to be applied to a charge of lack of impartiality is whether such charge is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances."

The reviewing judge, as well as the appellate court, passes only on the legal sufficiency of the affidavit and not on the truth of the facts alleged. *State v. Clothier*, 20 Kan.App.2d at 996.

Our Supreme Court stated in *State v. Foy*, 227 Kan. 405, 411, 607 P.2d 481 (1980):

> "The rule generally followed throughout the United States is that the words "bias" and "prejudice," as used in connection with the disqualification of a judge, refer to the mental attitude or disposition of the judge toward a party to the litigation and not to any views that he might entertain regarding the subject matter involved. Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one. [Citations omitted.] K.S.A. 20-311d(b)(5) specifies that personal bias, prejudice, or interest is ground for disqualification. This requires antagonism and animosity toward the affiant or his counsel or favoritism towards the adverse party or his counsel. *"Personal bias" is to be distinguished from "judicial bias," and does not include views based* upon matters arising during the course of the litigation or *upon general attitudes common to the public generally."* (Emphasis added.)

See 46 Am.Jur.2d, Judges §§ 146-56, 160-65.

Foy can be distinguished in the sense that there is no indication the trial court in that case was targeting the defendant when he made his

comments concerning indigent defendants. Here, although the petition signed by Judge Barbara does not expressly identify Westboro or any of its members as its target, Westboro asserts it is obvious the petition was directed toward its picketing activity. However, like in *Foy*, the principles espoused by signers of the petition here are general in nature. Moreover, the principles stated in the petition signed by Judge Barbara are principles entirely opposite from those required for a finding of bias or prejudice, namely, hostile feelings or a spirit of ill will.

The remainder of the issues relating to the lack of impartiality were well addressed in the assigned judge's order. There are sufficient grounds to support the trial court's finding that the affidavit was insufficient as a matter of law.

However, there still remains the fact that Westboro's picketing has been and continues to be the focus of much attention in the community, and Judge Barbara's signature was on a petition which, as asserted by Westboro, was directed toward its picketing activity. Therefore, on remand, given that courts must strive to avoid "even the appearance" of bias, we conclude that another judge should be assigned for further proceedings.

Finally, Westboro contends the court erred in failing to require a bond before issuing the restraining order pursuant to K.S.A. 60-903(a).

St. David's argues Westboro has failed to preserve this issue. As St. David's points out, there is nothing in the record on appeal to suggest that

Westboro raised this point before the trial court. "[A] point not presented to the trial court will not be considered for the first time on appeal." *Plummer Development, Inc. v. Prairie State Bank*, 248 Kan. 664, Syl. ¶ 3, 809 P.2d 1216 (1991).

In addition, the language of K.S.A. 60-903(a) indicates the decision whether to require a bond for a restraining order lies within the sound discretion of the trial court. Westboro makes no showing of an abuse of discretion here other than a general suggestion that no restraining order involving a First Amendment concern should be issued without a bond.

Affirmed in part, reversed in part, and remanded for further proceedings.

B. TEMPORARY RESTRAINING ORDER OF THE TRIAL COURT OF JULY 21, 1994

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DISTRICT

JUL 21 2 14 PM '94

GENERAL JURISDICTION
TOPEKA, KANSAS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION - BARBARA

ST. DAVID'S EPISCOPAL CHURCH,

Plaintiff,

vs. Case No. 94-CV-697

WESTBORO BAPTIST CHURCH, INC.

Defendant.

TEMPORARY RESTRAINING ORDER

TO: Westboro Baptist Church, Inc., its officers, agents, servants, employees and attorneys and persons acting in concert or participation with them:

1. The Court, after reviewing the pleadings on file, supporting affidavits and reviewing the applicable case law, specifically including Madsen v. Women's Health Center, Inc., 1994 U.S. Lexis 5087 (Dec'd

6/30/94), finds that a temporary restraining order should issue pending a hearing on a temporary injunction for the following reasons, to-wit:

(a) The defendant has acted with the intent of interfering with the use and enjoyment of plaintiff's property by the members and guests of St. David's and will continue to do so unless enjoined.

(b) That due to the manner of the picketing and demonstration there has been interference with the use and enjoyment of St. David's property.

(c) The interference that has resulted is substantial.

(d) The interference is of such a nature, duration and amount as to constitute unreasonable interference with the use and enjoyment of St. David's property by its rector, its members and its guests.

(e) The interference as stated above creates a volatile environment wherein injury to persons is imminent.

2. The activities of the defendant, its pastor, its officers, agents, members, and others acting in concert with them has constituted a nuisance. The activities and actions of these persons offend and endanger those lawfully using plaintiff's property. The actions of defendant obstruct the reasonable and comfortable use and enjoyment of the property, and most particularly its sacred usage for the worship of God. The Kansas Bill of Rights, Section 7, provides, "the right to worship God according to the dictates of conscience shall never be infringed;...." The rights of the members and guests of St. David's Episcopal Church to worship God according to the dictates of their conscience, have been and will continue to be infringed by the actions of the defendant, its agents, servants, employees and those acting in concert with it unless defendant is restrained.

3. Plaintiff should be granted a temporary restraining order because:

(a) There is a substantial likelihood that the movant will eventually prevail on the merits.

(b) Plaintiff will suffer irreparable injury unless the restraining order issues.

(c) The threatened injury to plaintiff outweighs whatever damage the proposed restraining order may cause defendant.

(d) The granting of the restraining order will not be adverse to the public interest.

4. For the purposes of this Temporary Restraining Order, the content of the allegations of the Affidavits attached to the Petition will be deemed to be true in that more than thirty days has passed since the service of the Petition without any pleadings or counter-affidavits having been filed in the meantime which contradicts in any material respect any of the factual allegations of the Affidavits or the Complaint.

5. That defendant's removal to the U.S. District Court has impeded the orderly process of this case and that plaintiff should not have to bear the consequence of this delay when important values secured by the Constitution of the State of Kansas are at risk.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Westboro Baptist Church, Inc. and its officers, agents, servants, employees and attorneys and persons acting in concert or participation with them are restrained from the following acts and activities:

1. From engaging in focused picketing of plaintiff on public property within 36 feet to the east, within 36 feet to the west, within 36 feet to the north and within 215 feet to the south of the church property owned and used for religious purposes by St. David's

(the property located on the northwest corner of 17th and Gage) from a period beginning one-half hour before and ending one-half hour after a religious event. The distance is to be measured from all points along the property line of the church's property.

2. That "focused picketing" means picketing by driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around plaintiff's house of worship by any person governed by the Order, while carrying a banner, placard, or sign. "Religious event" means any scheduled worship service 5:30 p.m. Saturday, 8:00 a.m. and 10:30 a.m. Sundays, and any wedding, funeral, memorial service for the dead, or the observation of other sacraments, rituals, or celebrations which are announced by a sign posted within ten feet of the St. David's sign on 17th Street which announces its ordinary services.

3. Defendant and the others described above likewise will be restrained from making any noise by signing, chanting, shouting or yelling, that can be heard through the walls of the church during any religious event.

4. The Sheriff of Shawnee County, Kansas is directed to personally serve a copy of this Temporary Restraining Order on the Reverend Fred W. Phelps, as resident agent and personally as the pastor of defendant Westboro Baptist Church at 3701 West 12th Street, Topeka, Kansas, 66604, and upon any and all persons engaged in picketing or carrying or displaying any signs or placards at St. David's Episcopal Church at 3916 West 17th Street, Topeka, Shawnee County, Kansas.

This Order shall be in effect and shall restrain all such activities until it is altered or amended by a temporary or permanent injunction or further Order of the Court.

The Court finds that this Order burdens no more speech than necessary to accomplish the governmental interest (which is also a compelling state interest) in protecting access to and the worship services of St. David's Episcopal Church and is in furtherance of the policies of Section 7 of the Kansas Bill of Rights which protects from infringement the right to worship God according to the dictates of conscious.

IT IS SO ORDERED. This Order is effective and in full force upon the filing of this Order in the Office of the Clerk of the District Court of Kansas, Third Judicial District, at Topeka, Kansas on the 21st day of July 1994, at 2:00 p.m.

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge (retired)

C. MEMORANDUM OPINION SUPPORTING ISSUANCE OF TEMPORARY RETRAINING ORDER OF THE TRIAL COURT OF JULY 21, 1994

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DISTRICT

JUL 21 2 14 PM '94

GENERAL JURISDICTION
TOPEKA, KANSAS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION - BARBARA

ST. DAVID'S EPISCOPAL CHURCH,

Plaintiff,

vs. Case No. 94-CV-697

WESTBORO BAPTIST CHURCH, INC.

Defendant.

MEMORANDUM OPINION SUPPORTING ISSUANCE OF TEMPORARY RESTRAINING ORDER

Now on this 21st day of July, 1994, this matter comes on before the court on plaintiff's Motion For A Temporary Restraining Order. There are no appearances although the court did confer by telephone conference with counsel for the parties to inform them

to submit any authorities prior to July 21, 1994 as the court was considering some form of relief to plaintiff.

Counsel will recall during the telephone planning conference of June 15, 1994, the court informed them that it was not disposed to grant an ex parte restraining order although the court was aware of K.S.A. 60-901 et. seq. allowing for one. The court set a hearing to allow the parties to present evidence for July 12-13, 1994. Counsel for the defendant informed the court and plaintiff's counsel that the defendant intended to file a notice of removal to the United States District Court for the District of Kansas.

On July 1, 1994, defendant gave notice of removal of this case to the said District Court. This court was so informed and the hearing scheduled for July 12-13, 1994 was continued by this court awaiting further action from the federal district court.

On July 14, 1994, the Honorable Dale E. Saffels granted plaintiff's Motion to Remand the case back to the Shawnee County District Court. The court "reluctantly" denied plaintiff's Motion for Attorney fees. The decision by Judge Saffels was made after "examining plaintiff's complaint, the parties submissions and the applicable authority, the court concluded that it was without subject matter jurisdiction.

This petition for relief has been on file since June 13, 1994. The basic premise for granting an ex parte restraining order is to grant emergency relief to prohibit irreparable damage and injury - a return to the status quo until the court can hear evidence from the parties. It is a most extraordinary remedy.

Consideration of the plaintiff's claim for emergency relief was precluded when the defendant attempted to remove this case to the federal court. The defendant improvidently filed the removal notice

resulting in a delay beyond the July 12-13 hearing date. Counsel for the defendant requested the court permission to present a brief in support of a motion to discuss the petition as well as a video tape. As stated the court did permit both sides to present any support for their respective positions but that the court was going to take some action on July 21, 1994.

The court has received various pleadings and briefs from defense counsel and the video tape. The court has reviewed them but has not at this time reviewed the tape. The focus apparently goes to proscriptions against speech and the court has no argument with this principle. The court will consider these and any other arguments at the time this matter comes on for hearing on plaintiff's motion for temporary or permanent injunction.

In reviewing the petition, affidavits attached thereto and considering the recent case of Madsen v. Women's Health Center, Inc. et al., decided June 30, 1994 by the United States Supreme Court (1994 Lexis 5087), the plaintiff is entitled to an ex parte temporary restraining order as set out in the Temporary Restraining Order issued on this date, pending a hearing on the temporary and permanent injunction.

The U.S. Supreme Court has on various occasions stated that the right of free speech is not unlimited. In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) the Court stated:

> The First Amendment does not guarantee the right to communicate anyone's views at all times and places or in any manner they may be

> desired. ... [activities] protected by the First Amendment are subject to reasonable time, place and manner of restrictions (p. 647)

The Court is not unmindful of the right to freedom of speech under the First Amendment, particularly in the public streets, a traditional public forum; only a content-neutral injunction will pass constitutional muster; that any injunctive relief must be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff to serve a significant government interest.

The court is also mindful that the state has a strong interest in protecting the rights of its citizens to worship in the church of their choice without unreasonable interference by the government or other citizens. The state also has a strong interest in insuring the public safety and order, in promoting free flow of traffic on the public streets and sidewalks, and in protecting the property rights of all its citizens.

The Supreme Court has declared that the "state's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Frisby v. Schultz, 487 U.S. 474 (1988). Certainly the church would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment. The defendant, all active members of the Westboro Baptist Church cannot dispute the right to worship in this kind of climate.

In addition to a request for relief from focused

picketing within a certain distance from the church property and relief from making any noise which may disrupt the religious events and worship, plaintiff has asked this court to extend the restraining order by restraining the defendant from "abusing, tormenting, or harassing persons either going to or from the church property by shouting (or any other level of noise above ordinary face-to-face conversation) defamatory words or obscene words, or words which would otherwise be regarded as fighting words .... and protect persons in or near the parking lots of the Capitol City Bank which are used by church members for parking, which are the two parking lots immediately south of the church property on 17th Street".

As stated in Madsen:

> ... But it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the service of the clinic (or ingress and egress to and from the church), regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic (church). Absent evidence that the protestors' speech is independently proscribable (i.e., "fighting words" or threats) or is so infused with violence as to be undistinguishable from a threat of physical harm, ...

this provision cannot stand.

The Supreme Court has repeatedly stated that in public debate our citizens must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. As plaintiff's counsel stated, the Kansas Supreme Court in State v. Adams, 254 Kan. 436, 441, has upheld statutes by narrowly construing a statute to prohibit speech limited to the category of "fighting words". Limited categories of speech which are not protected by First Amendment include: fighting words, obscenity, libel and incitement (citing cases).

However, it is this court's opinion that the caveat stated by the Supreme Court that in essence, outrageous speech is the price we pay to protect First Amendment rights of free speech, surely was referring to adults and the free exchange among citizens in the public forum and not to children. There is no absolute right of any person to intimidate, harass, use vulgar and obscene language to these children or in their immediate presence. The affidavits state that children accompany their parents to church. Children need to be informed that the right of free speech may include unpleasant and even outrageous words but a line must be drawn as to what they should be exposed to particularly through the sanctions of the court. Courts have not been reluctant to proscribe certain speech addressed to children whereas it has been permitted to adults. Yet there are no decisions concerning injunctive relief of this kind where children are exposed to the kind of speech referred to in this case.

Counsels are well aware that the issue of what constitutes "fighting words" is not easily definable and is still litigated in our courts. What constitutes harassment

and threat of violence or injury are more definable. The court finds from the affidavits there is evidence of threats which could reasonably result in harm or injury and violence, particularly when children in the company of their parents are confronted with any outrageous language or threats of violence. A parent will tolerate more outside the presence of his or her child. A volatile situation is imminent in this circumstance.

At this time, and until after hearing evidence, the court will not enter any order restraining the defendant from using "fighting words". Nor will the court include in the Temporary Restraining Order some prohibition or limitation on the matter of abuse, harassment or threats of violence or injury. The court has considered the potential for violence and is prepared to set distance parameters of picketing or contact with persons going to and coming from the church. The court requests counsel to brief this subject of limited speech to and in the presence of children of pre-teen age and consider presentation of this issue to the court at the hearing for temporary injunction.

The intent of this order is not to prohibit speech, it is intended to prohibit conduct - conduct which will unreasonably and unlawfully interfere with a citizen's right to ingress and egress to and from the church of their choice. The defendant still has the right and opportunity to vocally espouse their cause by alternative means.

It is the order of this court that a temporary restraining order be issued as is definitely set out in the Temporary Restraining Order entered and filed this 21st day of July, 1994.

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge (retired)

NOTICE OF HEARING

TO COUNSEL OF RECORD:

Please take notice that the plaintiff's Motion for Temporary Injunction is set for hearing on the 24th day of August, 1994 at 9:00 o'clock in the First Division of the District Court of Shawnee County, Kansas.

/s/ Michael A. Barbara
Michael A. Barbara
District Judge

D. Order denying rehearing or modification by the Kansas Court of Appeals of August 7, 1996

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94CV697

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

MARGIE J. PHELPS
3734 SW 12TH ST
TOPEKA, KS 66604

COURT OF APPEALS
FILED 8/7/96
STATE OF KANSAS

ST. DAVID'S EPISCOPAL CHURCH, APPELLEE
v. NO. 95-73928-AS
WESTBORO BAPTIST CHURCH, INC., APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY WESTBORO BAPIST CHURCH.
DENIED.

DATE: 08/07/96.

CAROL G. GREEN
CLERK

E. ORDER OF THE KANSAS SUPREME COURT DENYING REVIEW OF SEPTEMBER 9, 1996

SUPREME COURT ORDER
DISTRICT CASE NO. 94CV697

IN THE SUPREME COURT

OF THE STATE OF KANSAS

MARGIE J. PHELPS
3734 SW 12TH ST
TOPEKA, KS 66604

COURT OF APPEALS
FILED 9/9/96
STATE OF KANSAS

ST. DAVID'S EPISCOPAL CHURCH, APPELLEE
v. NO. 95-73928-AS
WESTBORO BAPTIST CHURCH, INC., APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT, WESTBORO BAPTIST CHURCH.
CONSIDERED BY THE COURT AND DENIED.
RESPONSE NOTED.

DATE: 09/09/96.

CAROL G. GREEN
CLERK

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

(3)

No. 96-582

In The

Supreme Court of the United States

October Term, 1996

WESTBORO BAPTIST CHURCH, INC.,

Petitioner,

vs.

ST. DAVID'S EPISCOPAL CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The Kansas Court Of Appeals

BRIEF & APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

There is a very limited record in this case. Counsel are aware of their obligation pursuant to rule 15, to point out in a brief in opposition any "perceived misstatement made in the petition" and any objections to "consideration of a question presented based on what occurred in the proceedings below".

The reason there is such a limited record available is that less than three business days before the combined hearing on the preliminary injunction and permanent injunction, Petitioners filed an appeal to the Court of Appeals of Kansas. Counsel in good faith believe that the allegations of the Petition, identified as "misstatements," are not uncontrovertible facts and by available evidence will be identified as "perceived misstatements."

The Petitioners do not identify, nor could they identify, any split of authority between the circuit courts or between the highest courts of the states on any of their issues.

Some Selected Misstatements

Misstatement No. 1. The first statement made in the petition "This petition pertains to a *preliminary injunction* by a trial judge . . . "

Evidence Available: From their own appendix it is obvious that this is not a "preliminary injunction," *it is a temporary restraining order.* (App. B1-5)

Misstatement No. 2. "Westboro Baptist Church, Inc. (WBC), is a small old school baptist church in Topeka, Kansas." (pg. 2).

Evidence Available: Westboro Baptist Church, Inc., has been led by one "Pastor" during its nearly forty years of existence. That is Fred Waldron Phelps. Mr. Phelps at the age of 17, after his freshman year at Bob Jones University, claims to have gone that summer to preach to the "Ute Indians" in Utah, and although a Methodist when he began this experience, he came back at the end of the summer an ordained Baptist minister.

At the time of these events the church had twenty-nine members. Today twenty-eight of them are related by blood or marriage to Fred W. Phelps.

Mr. Phelps is probably the most disciplined lawyer in the history of the state and his family of lawyers probably the most disciplined family. Mr. Phelps was suspended from the practice of law for two years, State of Kansas and Federal Courts, in 1969; followed by his disbarment from State of Kansas Courts and suspension in Federal Court for a period of two years in 1979; and ultimately his disbarment in Federal Courts in 1989. His disbarment in 1989 (as well as the discipline of two members of his family – Fred Jr. for six months and Margie J. Phelps for one year, respectively, in both State and Federal Court) was the result of a complaint filed in 1987 by every United State District Judge in the District of Kansas (sitting or senior status) against Mr. Phelps and every single member of the family firm, Phelps, Chartered. That complaint was more than a hundred pages in length and basically averred that Mr. Phelps and all the lawyers in the family firm (all members of the church) lied about and intimidated the Federal Judiciary. Within the family/church there are at least twelve law school graduates.

WBC has no affiliation with any other church or religious organization. It can be inferred from the evidence that this is a "family" or "clan" or some other entity than a "church."

Misstatement No. 3: Petitioners claim their picketing is in "connection with the ongoing debate in this country about homosexuality." (p. 2)

Evidence Available: The church has two primary forms of communication, pickets and facsimile communications which are broadcast throughout the community. A fair reading of those indicates basically an agenda of hate; the hate is not limited to homosexuals. The brand of "homosexual" or "fag" or "gay" or "sodomite" is more often than not a charge leveled at people who are heterosexual in their orientation. Themes of religious bigotry especially towards people of the Jewish faith, are evident. There are multiple examples of racial slurs and hatred. The generalized hatred of public officials (the Mayor, City Council, County Commissioners, the Sheriff, the Attorney General, the Shawnee County District Attorney, the Administrative Judge in the District and the Chief Justice of the Kansas Supreme Court) is evident. The claim of being "anti-homosexual picketers" can be shown in evidence to be pretextual. It is inferable that Mr. Phelps and family are pursuing an agenda of lies and intimidation against this and other churches as they previously had targeted the federal judiciary.

Misstatement No. 4: Westboro picketers specifically do not engage in acts of civil disobedience . . . (p. 6)

Evidence Available: There are some 20 separate events in Topeka involving physical altercations between

these picketers and members of the public. There have been three trials of picketers involving charges of battery resulting in one conviction of a church member for battery of a Lutheran minister on his own church property. In addition, the pastor and his grandson Ben have convictions arising out of picketing activity. Petitioner's counsel and the pastor have convictions for contempt in these proceedings in their attempt to disqualify Judge Barbara after he entered the T.R.O.

Misstatement No. 5: "The injunction was upheld on appeal by the Kansas Court of Appeals on a finding that an injunction could issue against lawful private picketing on a public sidewalk to protect the worship experience of persons who disagreed with the words, uttered and on signs, of the picketers." (p. i)

Evidence Available: Included in the appendix to the Brief in Opposition will be found the following examples of something more than disagreement from affidavits filed with the initial verified petition.

a. Nine year old Jason Buening on his way into Easter Services is yelled at by Jonathan Phelps (Petitioner's counsel's 300 pound-lawyer-brother), "Butt-fucker" and "Your mother is going to hell and take you with her, you son-of-a-fag." (V. Buening Aff.)

b. A church member was taunted by Reverend Phelps "That's the man whose daughter tried to kill herself" and other members of the family chiding "Did you remember to lock your medicine cabinet when you left so your dyke daughter won't kill herself." (B. Cecil-Fronsman Aff.)

c. One of the pickets calling a woman, who was a victim of cancer, "An old whore" and upsetting her to the point that she had to be consoled by other members for 10 to 15 minutes before she would go into the worship experience on Pentecost. (N. Flickinger Aff.)

d. The picketing of the wedding where members of the wedding party were called "Bull-dykes" and their presence requiring the wedding party to go out the back door of the church (Hud Hamilton Aff.)

e. The observation by the Priest that over time the pickets have become more vicious and verbally violent and have steadily moved closer to the parish and its people, with the appearance of trying to provoke a violent confrontation. (Two of the above-referenced altercations were adjacent to the church property near the time of church services with members of the public not associated with St. David's). The Priest also describes the intense emotional upheaval that is the result of being verbally battered with vulgar accusations and lies over an extended period of time and the depletion of the energy. Examples of statements that have been made to the Priest are "Rectum Bob and his KY-Jelly boys are having sex in the sacristy". He also describes the interruptions of major feasts of the church; Christmas midnight mass and Easter sunrise services. He describes the shouts and accusations that are made at members of the congregation as they pass by the pickets being called "Faggot," "sodomite" and "whore" and describing Eucharist participants as the people who "Drink rectal blood at the alter of their sphincter," these statements are in addition made in the presence of children. (Fr. R. Layne Aff.)

f. The affidavit Dr. Robert Proctor, a licensed psychologist, describes the pain and fright of the members and guests of St. David's as they were confronted by the pickets and the hurt and anger of parents trying to enter the church with their children through the picket line. He also identifies some of the events of which the members are aware which do involve physical violence at other picketing locations. (Dr. R. Procter Aff.)

g. The affidavit of the Bishop of Kansas, indicates that one of the picketers (and incidently counsel in this case) addressed him by saying " You have the authority, you look like someone who has authority, you ought to close this fag church!" (Rt. Rev. W. Smalley Aff.)

The Affidavits demonstrate that this T.R.O. and injunction was not sought simply because of ideological disagreement.

More specific disagreements could be identified, but the above specifics make the point that the activity in which the Petitioners have been engaged is not accurately reflected in their petition.

Subsequent Legislation

Since the granting of the temporary restraining order the City of Topeka has enacted two ordinances respecting picketing activity, which are in the appendix. There is substantial similarity and operative effect between the ordinances and this particular injunction.

Topeka Ordinance 54-135 was enacted July 28, 1995 and creates a buffer zone of 50 feet from the perimeter of church property on the sides where there is an entrance.

That ordinance when applied to this particular set of facts would enlarge the zone of the injunction on three sides of the church, but not on the fourth. However in practical application it only means that the picketers could be South of the church on a sidewalk across the street from the main entrance.

The Topeka Ordinance adopted September 20, 1995 creating a 90 foot perimeter would create an even greater buffer zone for the picketers than this injunction. Even though the distance on the South side of the church would be shorter (90 feet versus 215 feet), the fact that the 90 foot extends into private property where the picketers are not allowed to go would have the same effect as that provided by this injunction. In fairness it should be mentioned that WBC has challenged those ordinances, the hearings in fact were conducted for seventeen days, the matter has been fully briefed and is under advisement by a State District Judge.

Opposition to the reasons the writ should issue

A. THE CLAIM IS THAT IT WAS ERROR FOR THE STATE COURT TO FIND THAT A CHURCH BUILDING IS ENTITLED TO THE SAME LEVEL OF PRIVACY AS A RESIDENCE.

The Court of Appeals said:

> We agree with the trial court and find that in addition to the government interest in protected residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well. This interest does not flow directly from the

> right of free exercise of religion found in the First Amendment of the United States Constitution and § Seven in the Bill of Rights of the Kansas Constitution. Those constitutional provisions safeguard the free exercise of religion from governmental interference. However the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party. (App. A-20, 21)

The court also stated:

> More broadly stated to apply here, one's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy. (App. A-21)

Petitioners argue that the *building* is being protected, not the *worship services*. It is clear though from the injunction that the time element was 30 minutes before, during and 30 minutes after a posted religious service. (Appendix p. B-4) The observation that was made by both the District Court and the Court of Appeals was that the worshipers were the ones being disturbed. It is not the protection of the premises it is the protection of the use of the premises for worship by people that is articulated.

B. WAIVER OF PRIVACY INTEREST BY THE CHURCH.

Whatever this issue may be it is not one for Constitutional level inquiry. This is an issue that could be raised at a hearing on a preliminary/permanent injunction; which is the proceeding that the Petitioners have avoided

by its continuing appeal of the temporary restraining order.

C. THE CLAIM THAT PICKETING CANNOT BE ENJOINED UNLESS IT IS "UNLAWFUL."

Many of the picketing cases have involved "lawful" picketing including *Lawson v. Murray*, ___ U.S. ___, 115 S.Ct. 2264, 132 L.Ed.2d 269 (1995) cited by Petitioner. No requirement of *Madsen v. Women's Health Center*, 512 U.S. ___, 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994) requires a finding of unlawful activity.

D. THE CLAIM THAT MORE THAN "FOCUSED PICKETING" WAS ENJOINED.

The order makes clear that it is enjoining "focused picketing." (App. B-3) This is an issue again that could be raised in a hearing and the Court of Appeals directed the issue to be handled by the District Court. This court does not have a record before it, nor is it of constitutional significance to try to delineate whether this T.R.O. affects "focused picketing" or something more than "focused picketing". The absence of a record is critical. The Kansas Court of Appeals and the Supreme Court in Kansas should have a look at this issue before it becomes a matter for concern by this Court. Certainly the restrictions set forth in *Lawson v. Murray* (supra) of a 100 foot perimeter at all times and then a very limited period of time each week with a specified number of picketers beyond that distance indicates that this is not a matter of concern for this Court at this time.

E. THE CLAIM THAT THE INJUNCTION IS NOT CONTENT NEUTRAL AND BURDENS MORE SPEECH THAN NECESSARY.

Once again this is an issue that is not ripe for presentation to this court in the absence of a hearing. The argument contains a self-defeating reference to the Court of Appeals opinion indicating the need for further hearing.

F. THE CLAIM THAT THE STATE SHOULD NOT PROTECT THE WORSHIP EXPERIENCE.

The observation made by the Court of Appeals is that there would be a "hollow right" if third persons could interfere with the religious experience of other people. The observation is really that speech is not the *only* value in our society. The body of case law that recognizes that reasonable time, place and manner restriction can be imposed in a facially neutral manner to limit speech underpins the finding of the Kansas Court of Appeals. The *Madsen* limitation for injunction nevertheless permits restrictions, but, requires more scrutiny than if the restriction was imposed legislatively. Certainly, a government has an interest in protecting privacy and this extension to religious privacy is a logical and reasonable extension. It is a declaration by the Kansas' courts of a Kansas State interest that is substantial; certainly a finding within the jurisdiction of the Kansas' courts.

G. THE CLAIM THAT THE STATE COURT COULD NOT TREAT WESTBORO'S PICKETING AS A NUISANCE.

This is essentially a cumulative claim with no special distinction from the points that proceed it.

H. THE CLAIM THAT WBC SPEECH WAS ENTITLED TO LESS PROTECTION BECAUSE CHILDREN WERE PRESENT.

Children were not allegedly present; according to the affidavits they were present! The court recites its analysis of US Supreme Court cases including *FCC v. Pacifica Foundation*, 438 US 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, rehearing denied 439 US 883 (1978) their conclusion "In general, these cases show that depending on the content the government does have an interest in protecting children from objectionable speech beyond the interest it has in protecting adults from the same speech." The description of the experience of Jason Buening, the nine year old who was called a "butt-fucker" by a 300 pound man in close proximity, is certainly more threatening than anything that occurred to the child auto passenger exposed to George Carlin's 12 minute monologue on "filthy words". The Petitioners fail to appreciate the hostility and fear that they generate through their conduct, but, even though they may be ignorant of the impact the courts do not need to share in that ignorance.

Conclusion

This is a case that is not ripe for consideration by this court on a Petition for Certiorari. This is a case that needs an evidentiary hearing. With the enactment of the ordinances in the City of Topeka which restrict picketing near houses of worship there is little if anything that these picketers would be permitted to do today even if this temporary restraining order was lifted.

Respectfully submitted,

JERRY R. PALMER
Supreme Court Reg. #6362
PALMER & LOWRY
112 W. Sixth Street
Suite 102
Topeka, KS 66603
(913) 233-1836
Counsel of Record

APPENDIX

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Sec. 54-135. Picketing of religious events.

(a) *Definitions.* The following words and phrases, when used in this section, shall have the meanings respectively ascribed to them:

Announced religious event means a religious event regarding which the public has been provided notice of the beginning time and of the duration or ending time of such event by the conspicuous posting of a sign on the property where the event is to be held.

Focused picketing means standing or sitting or walking in a repeated manner past or around a house of worship, by one or more persons while carrying a banner, placard, or sign.

House of worship means any church, synagogue, mosque, or other structure that is regularly used for the exercise of religious beliefs.

Religious event means any scheduled worship service, wedding, funeral rite, memorial service for the dead, or other observance of a religious sacrament, ritual, ceremony or celebration that takes place at a house of worship or on the property where a house of worship is situated.

(b) *Unlawful acts.* It is unlawful for any person to engage in focused picketing, during the time period from one-half hour prior to the beginning time of an announced religious event until one-half hour after the ending time of the event, on public property at any of the following locations:

(1) On the sidewalk adjoining the property on which a house of worship is situated; or

(2) In the street or roadway adjoining or adjacent to the property on which a house of worship is situated; or

(3) On the public area between the house of worship and an adjoining or adjacent street or roadway, including but not limited to the curb, drainage, or area between the street and sidewalk (if a sidewalk exists) commonly referred to as the "parking" or "easement"; or

(4) On any public property within 50 feet of the property line on which a house of worship is situated, if any entrance to the house of worship is located on that side of the property.

(c) *Penalty*. Any person violating this section may be punished by:

(1) A fine of not more than $499.00;

(2) Imprisonment in jail for not more than 179 days; or

(3) Both such fine and imprisonment not to exceed the limits set out in subsections (c)(1) and (c)(2).

(Ord. No. 16843, §§ 1-3, 7-11-95)

(Published in the Topeka Metro News: September 20, 1995)

ORDINANCE 16859

AN ORDINANCE introduced by InterFaith of Topeka pursuant to K.S.A. 12-3013 regarding picketing of religious events.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS:

Section 1. **Name:** This Ordinance shall be known as the "Picketing of Religious Events" Ordinance.

Section 2: **Definition:** All words and phrases, when used in this article, shall have the meanings, respectively described to them:

A. *"Focused picketing."* Means picketing by standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around a place where a religious event is to take place or is taking place or has taken place by any person while carrying a banner, placard or sign. Focused picketing does not include any activity carried on under a validly issued parade permit.

B. *"Demonstrating."* Includes all of the activities indicated in A. above for "focused picketing," but is done by persons who are not carrying any of the devices enumerated but who verbally address any person who is not participating in the demonstration who appears to be coming or going from a protected event when the person is addressed in a hostile or rude or loud manner.

C. A *"protected event"* means a religious event. Religious events include scheduled worship services,

weddings, funerals, memorial services for the dead, and the observation of other sacraments, rituals or celebrations which may take place in the house of worship.

D. *"Posted."* Religious events become protected when the time of those events have either been announced in a newspaper regularly printed on at least a weekly basis within the city or which have been announced by a sign within 200 feet of the primary entrance to the structure where the event is to be held.

Section 3. **Unlawful Acts:** It is unlawful for any person to engage in focused picketing or demonstrating on, or within an area 90 feet adjacent to, the property of grounds containing a structure where a religious event is being held. This action is only in violation of this Ordinance if the picketing or demonstrating is done within the one hour before, during, or one half hour after a protected religious event which has been posted. The distance shall be measured from all points along the property line of the property where the structure that houses the event is located.

Section 4. **Severability:** If any part or parts of this Ordinance shall be held unconstitutional, invalid, or otherwise unenforceable by any Court of competent jurisdiction, such decision shall not affect the validity of the remaining provisions of this Ordinance.

Section 5. **Effective Date:** This Ordinance shall take effect and be enforced from and after its passage, approval and publication in the official city newspaper.

PASSED AND APPROVED by the City Council: September 12, 1995

(Seal of Topeka)

/s/ Harry Felker
Harry Felker, Mayor

ATTEST:

/s/ Iris E. Walker
Iris E. Walker, City Clerk

AFFIDAVIT OF VICKI BUENING

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Vicki Buening, I am married to Larry Buening, we have two children, Jason 9, and Lindsey 12. We are all members of St. David's Episcopal Church, Topeka, Kansas.

2. We made a decision when St. David's started its witnessing program that we would participate as a family and proclaim God's love, and felt that we should take a stand and not just accept what was happening on our doorstep with the WBC picketers. We wanted our children to participate but we would not endanger them. We were the first group leaders and would participate at least once each six weeks as witnesses.

3. On Easter morning, my family had witnessed and the WBC group was quite hostile and verbal, and they were walking very close to us preaching and shouting at us, and they were close enough that it was physically intimidating. During the sunrise service, Father Bob led a procession out of the west door on the south side of the church and processed to the east door on the same side of the church. When he emerged with the congregation picketers started yelling at him, calling him "Rectum Bob," and other insults and making a great deal of noise during one of the most significant religious services of our church year.

4. We went home and came back later for the 10:30 a.m. Easter Service, and I was with my son Jason. I heard

Jonathan Phelps yell at Jason, "buttfucker," and "your mother is going to hell and take you with her, you son of a fag." After those experiences we decided that it was unsafe to have our children on the line and that they were in danger. From the circumstances I was convinced the WBC people were trying to pick a fight and I didn't want my children to be involved.

5-6. I personally have stopped witnessing because I can't any longer take the humiliation and degradation that comes along with standing outside my church with a sign that proclaims God's love.

7. I do continue to go to church, but every time I see the Phelpses, I develop a feeling of hostility and it takes several minutes for me to be inside the church and inside the service before I get centered enough to appreciate the worship service that I came for. I feel verbally assaulted each time I pass them, and so to avoid them, I go in the back door of the church at the rear of the building on the west side, rather than entering through the front door as I ordinarily would. The WBC members are interfering with my right to worship and it affects me adversely and the members of my family adversely.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Vicki Buening
Vicki Buening

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Vicki Buening, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of her knowledge, information and belief.

/s/ Vicki Buening
Vicki Buening

Subscribed and sworn to before me this 7th day of June, 1994.

/s/ Jerry R. Palmer
Notary Public

(Notary Seal)

My Appointment expires: 10/12/95

AFFIDAVIT OF BILL CECIL-FRONSMAN

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Bill Cecil-Fronsman, I am a professor at Washburn University and am a resident of Topeka, Shawnee County, Kansas, and have been since August of 1989, a member of St. David's Episcopal Church, Topeka, Kansas.

2. I have been part of the witnessing program at St. David's and stand in front of the church with a sign proclaiming God's love for all people.

3. Sometime during the autumn of 1993, Mr. Fred Phelps (pastor of the Westboro Baptist Church), shouted out to me, "That's the man whose daughter tried to kill herself." He pointed me out and a number of his family members began to laugh. That was the beginning of what I consider to be a persistent pattern of personal harassment.

4. In December of 1991, my then 12-year old daughter deliberately took an overdose of her insulin (she is an insulin-dependent diabetic). She was hospitalized and has continued to struggle with depression. The Phelps family has made her an object of ridicule. On numerous occasions since last fall members of the Phelps family have made explicit references to her suicide gesture. For example, in March of 1994, while I was leaving my car to enter St. David's, a member of the Phelps family called out "Did you remember to lock your medicine cabinet when you left so your dyke daughter won't kill herself?"

5. This incident has come up in a number of other taunts. A persistent taunt of the Phelps family has been to ask if I have learned to stitch up wrists. This question has been asked of me repeatedly in obvious reference to her suicide gesture.

6. While leaving church on Sunday, May 22, 1994, one of the younger male members of the family shouted out an accusation that I was a sodomite and that this was why "Thea tried to kill herself."

7. It is difficult for me to describe the pain that this has caused me. Anyone who has coped with the depression of a family member knows that it is a difficult and demanding process for all involved. I have sought support and solace from the members of St. David's and have found this to be a community that has stood by my family and me during our struggles. I feel as though the Phelps family has attempted to strip away this source of comfort. Every time I go to church I must be prepared to be reminded of one of the most painful experiences in my life. Instead of coming to church in a joyful mood, looking forward to the comfort God's message brings, I must instead face a gauntlet of hostile taunts from people who seek to stir up the pain of this experience.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Bill Cecil-Fronsman
Bill Cecil-Fronsman

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Bill Cecil-Fronsman, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of his knowledge, information and belief.

/s/ Bill Cecil-Fronsman
Bill Cecil-Fronsman

Subscribed and sworn to before me this 12th day of June, 1994.

/s/ Susan J. Daffron
Notary Public

(Seal)

My Appointment expires: 10/22/94

AFFIDAVIT OF NANCY FLICKINGER

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Nancy Flickinger. I am a resident of Topeka, Shawnee County, Kansas, and am a member of St. David's Episcopal Church.

2. On April 22, 1994, (Pentecost Sunday), about 10:15 a.m. I was standing on the porch on the south side of St. David's. Frank Rice and his wife were walking down the public sidewalk and the WBC pickets were strung along that sidewalk. Thirty feet behind Frank and his wife were another couple whom I did not at that time know. One of the younger WBC members called the lady a "an old whore." The woman's husband turned around and put his hands on a young man next to the one who had uttered the statement and started arguing with him. I urged him to get back because of what I feared would be physical violence that would follow. About that time the young red-haired Duncan boy tried to get involved and the Henault boy and my daughter Heidi Crossland went out to pull the Duncan boy away from the scene. Heidi then brought the lady into the parish and she was visibly shaken and quite upset by the altercation. She explained she was a cancer victim and she was going in for tests on Monday and that she was one of the people for whom we had been praying. Several of us spent 10 to 15 minutes with her trying to encourage her and demonstrate the love within the parish to try to help her overcome the experience outside the doors of our church. Pentecost is one of the highest holy days in the Episcopal year.

3. On the evening of June 4, 1994, between 4:30 and 5:00, I was on the witness line and one of the younger members of the WBC was calling me a "dyke" and a "whore." Jonathan Phelps came up and said no, he shouldn't be calling me those names, he should be calling me "Bitch Flickinger," and that "she eats vomit." I was shaking inside and I kept repeating the Lord's Prayer.

4. Sometime back (the night the motorist was attacked at 17th and Gage), the WBC pickets were much more aggressive than usual and appeared to be looking for a fight. Charles Hockenbarger got within six inches of my face and called me a "motherfucking son of a bitch." It was later that afternoon that the motorist got out of his car and started arguing with the WBC picketers, and they took him down on his stomach and spread his legs. The attack appeared to be choreographed with each person doing a specific job.

5. The pickets are becoming increasingly more intimidating and their aggressiveness toward people coming into the church like the experience of the Ohse's on April 22, makes me fear that our members or guests will be injured from simply getting into an argument after having these cruel accusations made to them.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Nancy Flickinger
Nancy Flickinger

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Nancy Flickinger, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of her knowledge, information and belief.

/s/ Nancy Flickinger
Nancy Flickinger

Subscribed and sworn to before me this 9th day of June, 1994.

(Seal) /s/ Diane S. Kathrens
Notary Public

My Appointment expires: 1/31/95

AFFIDAVIT OF HUD HAMILTON

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Hud Hamilton, I am a resident of Topeka, Shawnee County, Kansas, and am a member of St. David's Episcopal Church.

2. Saturday, June 4, 1994, was one of the biggest days of my life as my only daughter was married at St. David's Episcopal Church.

3. Immediately after the service as we walked out the east door on the south side of the church, we were confronted by the WBC picketers.

4. The wife of one of the wedding party who was from out of town and unaware of the pickets, was called a "bull dyke."

5. One of the picketers, a man named George who works at Falley's, started yelling at me.

6. The worst part of the experience was that my friends and relatives couldn't understand why the wedding was being picketed and it was extremely embarrassing to me and my family.

7. The bride and groom were upset, but tried to calm everyone down and not let it spoil the day. The groom's stepfather and I were both so furious that we nearly physically confronted the picketers.

8. After the photographs were taken we steered the wedding party out the back door, rather than coming out

of the front door of the church as would be normal. My daughter is a third generation member of St. David's, has been a missionary, and is about to enter the priesthood of our church, and I will always grieve the blemish that was placed on her wedding by these cruel people.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Hud Hamilton
Hud Hamilton

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Hud Hamilton, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of his knowledge, information and belief.

/s/ Hud Hamilton
Hud Hamilton

Subscribed and sworn to before me this 6th day of June, 1994.

/s/ Diana L. Karasek
Notary Public

My Appointment expires: 12/16/97

(Seal)

AFFIDAVIT OF FR. ROBERT P. LAYNE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Robert P. Layne, I am the Rector of St. David's Episcopal Church and a duly ordained priest of the Episcopal Church.

2. For over two years "hate pickets," members of the Westboro Baptist Church, have picketed one or more services, sometimes all of them, at this church. The members and guests and others who seek to worship at St. David's have been regularly assaulted with visual and verbal violence on their way to the parish religious services.

3. Originally these attacks were limited to Sundays. Later their harassment was expanded to include the regular 5:30 Saturday evening Holy Eucharist and now extends to weekday services, including the Order of St. Luke.

4. The largest numbers of picketers seem to be drawn to us on the holiest of days in our church (Easter, Pentecost, Christmas and Palm Sunday).

5. Over time the number of verbal assaults and threatening behavior has become noticeably escalated.

6. Many of our members complain about this hate on our doorstep and how it is upsetting their personal religious experiences worshiping at St. David's.

7. After a year of not directly taking any action the people of St. David's decided to make a peaceful but

assertive response, and in that way set up the witnessing program by personally, peacefully and consistently confronting the "hate picketers" by public witnessing to the truth of God's love. This occurs every Saturday evening and Sunday morning.

8. Through all extremes of weather, parishioners continue to station themselves on the perimeters of the church, proclaiming with their own signs that the God worshiped at St. David's is a God who loves all he creates and that St. David's is a house of prayer for all people. Over 130 members of the parish have participated at one time or another, and almost a like number of persons from the community have joined on one or more occasions to assist in this endeavor.

9. Strict rules of non-confrontation and non-violence are observed, and each witness must sign the pledge each time they witness, and the rules of witnessing are posted on the back of all of their signs as reminders, in order to hold down the possibility of violence which is ever present.

10. The response of the WBC pickets has been for more vicious and verbal violence. They have steadily moved closer to the parish and its people, and in my opinion from viewing the escalation of activity, are trying to provoke a violent confrontation.

11. We have on numerous occasions asked the police to be present, and sometimes patrol cars are dispatched and sometimes they are not. The police have some tempering influence on the picketers, but not entirely. I have actual fear that there will be physical confrontations between members of my congregation and

the picketers as they approach in proximity, and become more verbally combative. There is a noticeable difference in these parameters from a year ago.

12. Words can hardly express the intense emotional upheaval that is the result of being verbally battered with vulgar accusations and lies over an extended period of time. To inhibit this normal human impulse to strike back against vulgar, personal insults, demands tremendous energy. It emotionally drains those who so endure, so absorb it, and so control their reaction. Additional energy is also demanded and depleted when one must immediately shift emotions, go into church, lead worship and proclaim the truth of God's love and celebrate and share his living presence in the Holy Eucharist. Such an effort for me is very difficult.

13. When I stand beside members of my parish and suffer the abuse and taunts (Rectum Bob and his K-Y Jelly boys having sex in the sacristy), and the like, I must clear my heart of pain and anger sufficient to worship God in peace and lead my congregation. Our clergy and our lay people have suffered grievously from this persistent onslaught of hate. We have endured this aggression and maintained self control for over two years.

14. The persecution takes an even greater toll on those who come to church already weakened by physical illness or emotional concerns or the oft-endured internal struggles with the difficulties of ordinary life. For those already dealing with internal crisis, the forced walk through the "hate pickets" greatly intensifies their pain and multiplies their wounds, bringing some to tears and others to the point that they cannot worship.

15. On Pentecost Sunday (May 22, 1994), when a member of St. David's who is suffering from life-threatening cancer was verbally accosted and insulted by the hate picketers as she approached the church seeking comfort and solace, this innocent woman was emotionally shattered and subsequently had to leave in tears. Some of her fellow members hearing the cruelty and seeing the results rushed to this lady's defense. This nearly resulted in a serious physical conflict. Cooler heads prevailed, however, and in the face of continued verbal assaults from the picketers, other parishioners successfully brought the angered ones into church. How many others seeking the healing administration from the church have been denied that ministry because of their weakened condition and the tremendous amount of effort and energy needed to merely walk through the hate on the sidewalks adjacent to St. David's cannot be calculated, but as a priest I can infer that there are those who are not using the services of the church for this reason. I am told of these things by my parishioners.

16. Other examples of particularly painful experiences have occurred on the major feasts of the church when the congregation swells with many visitors. On Christmas Eve the beautiful silence and solemnity of the Midnight Mass celebrating the birth of the Prince of Peace was shattered by the shouts of condemnation and hate that greeted innocent late-night worshipers. Again, on Easter morning when many gathered at sunrise outside the church to begin the annual remembrance of the Resurrection of the Prince of Peace, the morning was broken with loud insults and threats leveled against those gathered to joyfully celebrate.

17. On the previous Palm Sunday when six local churches for the 24th year gathered at its sister parish to join in a "blessing of the palms," all of the St. David's marchers were forced to walk through a phalanx of hatred and shouts of insults, while members of the WBC flanked the parade, hurling vicious accusations against the worshipers and their priests.

18. During Pentecost the children of St. David's would ordinarily have gone to the Memorial Garden in St. David's and distributed red ladybugs, but this would have placed them in such close proximity to the hate pickets that instead they were diverted to the Tomato Patch west of the parish, so that the children would not have to face the hate.

19. Words are weapons, they weaken, wound and can even destroy. Increasingly we are reminded of the damage done by verbal abuse. Many Topeka health care professionals spend their entire practices trying to heal the wounds inflicted by the verbal abuse of parents, siblings or even cultures. All of us are being encouraged to correct old insensitivities and to guard against the current words that demean or denigrate other persons. Native Americans are offended by sports teams that indiscriminately describe themselves with names or mascots reflecting Native American life or culture. Equally the word "boy" spoken to an African American male has been judged damaging and derogatory. The vulgar words hurled against the good people of St. David's weaken and wound with a viciousness that I believe equals or exceeds the examples mentioned. This bombardment of hate wounds the worshipers of St. David's.

20. The picketers who surround St. David's every week have shouted as accusations at members of our congregation, "faggot," "sodomite," "whore" (any woman with short hair,) "Rectum Bob Layne who has rectal sex with his K-Y Jelly boys in his rectumry," and "they" (the people of St. David's) are those who "drink rectal blood at the altar of their sphincter!" These shouts are directed at random against persons entering the church. It is especially painful for parents who must explain to the children the meanings of the vulgar signs and words directed toward them, not only by the adult picketers, but even by the children of the WBC members.

21. I am aware of at least one family who has left the parish because they can no longer tolerate the hate at its doorstep. This is a woman who was baptized, married, whose children were baptized in the parish, and whose parents were for years leaders in this parish. It is now a family which can no longer worship together in peace in their home parish.

22. In part, the witnessing program was to help establish that the message of St. David's parish is the proclamation of the love of God toward all persons and we have feared and our fears have been confirmed that others who pass by the corner of 17th and Gage have attributed that the message of the WBC pickets as espoused on their signs and from their mouths to the passersby as being owned by St. David's Episcopal Church, and that these are the actions of our members. This leads to irreparable damage to our name. Confirmation of these fears have been brought to me by members of the parish who have talked to the people who made

this mistake and were subsequently corrected by members of the parish, but due to the traffic volume on Gage and the low number of interactions that would be expected with St. David's members, it is fair to infer that many believe that these awful statements ("God hates every day," "God hates fags," "Hate is a bible value"), are the messages of our church and does inestimable damage to our reputation.

23. It has been reported to me that at the 5:30 p.m. service that the singing and shouting adjacent to the chapel where we hold that service is disturbed by the sounds emitted from the WBC members.

24. On June 4, 1994, a young couple was married in our sanctuary and some 350 people attended the wedding, and as the celebrants left to go to the reception the WBC pickets were lined up directly in front of the main entrances to the church and shouted at and taunted the wedding guests, greatly upsetting the families in the wedding.

25. Ray Bloxom who was not a member of our parish but whose funeral service was held in our church, had his family assaulted with signs declaring "Ray is in hell" on the approaches to the church, prior to the service.

26. In no way can the WBC demonstrators be described as "peaceful pickets." Their messages of filth portrayed on their signs many times have no relevance whatsoever to any potential issue with our parish, "bare butt Jan," "Fag God = rectum," "Fag ___ (multiple persons who have no association at all with the church)." One of the signs declares "Fags wed here." (Episcopal church doctrine prohibits weddings between persons of

the same sex and to perform such weddings would be a violation of church law and is not done in this parish.)

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Fr. Robert P. Layne
Fr. Robert P. Layne

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Fr. Robert P. Layne, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of his knowledge, information and belief.

/s/ Fr. Robert P. Layne
Fr. Robert P. Layne

Subscribed and sworn to before me this 7th day of June, 1994.

/s/ Jerry R. Palmer
Notary Public

My Appointment expires: 10/12/95 (Seal)

AFFIDAVIT OF DR. ROBERT PROCTER

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. My name is Dr. Robert Procter, I am a Ph.D. licensed psychologist, and I live and work in Topeka, Shawnee County, Kansas. I have been a member of St. David's Episcopal Church for over twenty years. I have been one of the leaders of St. David's witnessing program.

2. Being involved with the witnessing program has put me in contact with the WBC members on nearly a weekly, and sometimes twice weekly, basis for over the past year. I have heard verbal accusations made by the WBC pickets toward the members and guests of St. David's where persons on their way to worship have been called "fags," "whores," "dykes," "faggy boy," "slant-eyes," "little Nazi," "buttfuckers," and the like.

3. To these same persons, the WBC pickets have said that the wine served at the altar is "rectal blood," that the worshipers are "worshiping at the rectum," that they are "worshiping at the altar of the sphincter," that the members are participating in "gerbiling," with description of pulling of the nails from the gerbils and inserting them in rectums. These are all statements that are grossly offensive to an Episcopalian for when the cup is passed and served to the members the pronouncement is made by the priest or deacon, "the blood of Christ, the cup of salvation," and the characterization of the sacramental wine as rectal blood is a sacrilege.

4. The WBC pickets are by their presence physically intimidating. When the witnesses are not present, they will line the front sidewalk of St. David's from the driveway east to the sidewalks which enter the south side of the building. They will chant or sing or shout or sometimes preach condemning the Episcopal Church. When the witnesses are present they are standing with their signs or may walk behind the St. David's witnesses whose signs are there. On one occasion I remember one of them saying, "how would you like to be in a headlock?" They are particularly abusive toward our Rector, calling him "Rectum Bob" and other insulting names.

5. The five most verbal members of the group who are among the most vile and aggressive are Fred Phelps, Sr., Marjorie Phelps, Jonathan Phelps, James Hochenbarger and George Stutzman.

6. My interpretation of their language is that it is provocative and seeks an angry response and in my opinion they are looking for a fight. In our witnessing program we put on as many controls as we can to avoid such an incident arising. The St. David's witnesses on each occasion must sign a pledge of non-violence; the principles of non-violence and avoidance of interaction with the WBC pickets is reduced to a number of rules and taped to the back of the signs that are carried by the St. David's witnesses.

7. I have seen the pained and frightened expressions of the members and guests of St. David's as they are confronted by the WBC pickets. I have seen the distress our witnesses go through after enduring obscene taunts by the WBC pickets. I have seen the hurt and anger of

parents trying to shepherd their children to church through these obscenities.

8. The members of St. David's are well aware of the potential for violence with the WBC members. Included in our knowledge is an incident which occurred March 12, 1994, at the corner of 17th and Gage when a motorist got into an altercation with the WBC pickets on the northeast corner of the intersection and they set upon him. All of our members are aware of the attack on the Rev. Weeks, and many of our members are aware of the attack on the jogger in Gage Park, the video crew at 6th and Kansas, the Stringer boy at a church bazaar, and the Vintage incident. The people of St. David's are threatened physically by the presence of the WBC pickets, and this increases when they are in proximity to our members or when they are being more verbally abusive, and this is disturbing to the worshipers of St. David's, and is reputedly by many accounts of persons with whom I have talked, a diminishing of the religious experience at St. David's.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Robert L. Procter
Dr. Robert Procter

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Dr. Robert Procter, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of his knowledge, information and belief.

/s/ Dr. Robert Procter
Dr. Robert Procter

Subscribed and sworn to before me this 7th day of June, 1994.

/s/ Jerry R. Palmer
Notary Public

My Appointment expires: 10/12/95 (Seal)

AFFIDAVIT OF THE RIGHT
REV. WILLIAM E. SMALLEY

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

1. I am the Right Rev. William E. Smalley, Bishop of the Episcopal Diocese of Kansas and a resident of Topeka, Shawnee County, Kansas.

2. That on Saturday, June 4, 1994, I was officiating at the wedding of Gar Demo and Kelly Hamilton at St. David's Episcopal Church, Topeka, Kansas.

3. As I was leaving the church, the Westboro Baptist Church pickets were arrayed on the public sidewalk on the south side of the church.

4. A woman I know to be Marge Phelps addressed me by saying, "You have authority, you look like someone who has authority, you ought to close this fag church!"

FURTHER AFFIANT SAYETH NAUGHT.

/s/ The Right Rev. William E. Smalley
The Right Rev. William E. Smalley

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

The Right Rev. William E. Smalley, of lawful age, being first duly sworn, states that the above Affidavit is true and correct to the best of his knowledge, information and belief.

/s/ The Right Rev. William E. Smalley
The Right Rev. William E. Smalley

Subscribed and sworn to before me this 9th day of June, 1994.

/s/ Susan J. Daffron
Notary Public

(Seal)
My Appointment expires: 10/22/94

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

No. 96-582

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Westboro Baptist Church, Inc.,
Petitioner,

vs.

St. David's Episcopal Church,
Respondent.

On Petition for Writ of Certiorari to the Kansas Court of Appeals

REPLY BRIEF & APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Margie J. Phelps
Counsel of Record
3734 S.W. 12th Street
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(913) 273-7380

20 pp

State v. Huffman, 228 Kan. 186, 62 P.2d 630 (1980) . 6

Tilton v. Richardson, 6 F.3d 638 (10th Cir. 1993) . . . 8

Topeka City Ordinance 54-164 7

D. Even if Westboro's religious beliefs are incomprehensible or abhorrent to some, this does not strip her picketers of First Amendment protection 8

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) . . . 9

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989) 9

Pursuant to Rule 16.5, Westboro Baptist Church submits her reply brief herein. Issues presented by Respondent's brief:

1. Whether the trial court's order is an injunction eligible for appellate review.

2. Whether review should be denied because Topeka ordinances would restrict Westboro's picketing as much as the injunction.

3. Whether the alleged use by one Westboro picketer of a graphic term describing the male homosexual act in the presence of a minor justifies the broad injunction against *picketing* of *all* Westboro picketers.

4. If Westboro's religious beliefs are incomprehensible or abhorrent to some, whether this strips her picketers of First Amendment protection.

A. The trial court's order is an injunction eligible for appellate review.

In Kansas, a party has a right of appeal from an interlocutory order that grants, continues, modifies, refuses or dissolves a preliminary injunction. K.S.A. 60-2102(a)(2). This exception recognizes an injunction creates the "possibility of drastic consequences which cannot later be corrected". *Sampson v. Murray*, 415 U.S. 88, 94 S.Ct. 937, 951, n. 58, 39 L.Ed.2d 166 (1974). If a preliminary injunction is at issue, it is subject to full appellate review.

Under Kansas law, the order is an injunction by its nature, scope and duration; and, because the trial court denied a motion to dissolve or modify, which converted the order to an injunction (if it was not already an injunction).

A temporary restraining order is of short duration, only preserves the status quo, and does not require review of evidence for its issuance. Its purpose is to freeze the status quo until evidence can be reviewed. A preliminary injunction, by

contrast, makes at least a preliminary determination of the merits, is issued after review of evidence, is long in its duration, and is broad in its scope. A preliminary injunction provides affirmative relief to the movant.

In our case, the trial court's injunction was in place for many months; it altered the status quo, stopping picketing and counter picketing which had occurred for years; provided respondent with affirmative relief; and made preliminary decisions about the merits, after receipt of evidence from both parties. Given these features, the order is an injunction, eligible for appellate review. *Burnett v. Doyen*, 220 Kan. 400, 352 P.2d 928 (1976); *Harwi v. Harwi*, 143 Kan. 710, 56 P.2d 449 (1936); *Laswell v. Seaton*, 107 Kan. 439 (1920); *City of Emporia v. Telephone Co.*, 90 Kan. 119 (1913).

Further, once the trial court heard and overruled a motion to dissolve the restraining order (in December, 1995), by operation of law it then converted to an injunction (if not before). *Transport Wkrs. U., Loc. 502 v. Tucson Air. Authr., Inc.*, 464 P.2d 367, 369-370 (Ariz.Ct.App. 1970). After Westboro appealed the injunction to the Kansas Court of Appeals, that court *sua sponte* raised the jurisdictional question, and had the parties brief the court's jurisdiction and whether it was in the interest of judicial economy to retain the appeal. After briefs were submitted, the court retained the appeal. Respondent sought no review from that ruling, and did not cross petition this Court on this issue.

B. The Topeka ordinances are not as restrictive as the injunction, and do not dispose of the issues raised here.

Respondent suggests Westboro picketers would have no practical relief if this Court reviewed and set aside the state court injunction, because two Topeka ordinances place similar restrictions on church picketing. Not so. The Topeka ordinances are under challenge on a multitude of constitutional

grounds.[1] Noting the "power" of churches,[2] the trial court entered an injunction against the 90-foot ordinance. See Appendix A hereto.[3] Only the 50-foot prohibition applies; and, that ordinance contains protective requirements (e.g., start *and*

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[1] The ordinance challenge case presents the same critical issue presented here: What is the level of privacy to be afforded the building of a house of worship? Respondent disposes of this issue with little discussion, saying the issue is of little relevance. Yet church picketing is an issue which reached the Kansas Supreme Court in *City of Prairie Village v. Hogan*, 253 Kan. 423, 855 P.2d 949 (1993), and reached national headlines when ACT UP picketed St. Patrick's Cathedral because of its position on homosexuality. One must be oblivious to current events to suggest that church picketing is not a ripe issue.

[2] The trial court said:

Thus, the place restrictions imposed by these city ordinances now before the court encroach upon First Amendment areas not definitively addressed by existing case law. Further, even those cases cited proscribing residential picketing assume the residence is not being used as the site of some meeting, assembly, or other event. In this regard, no question can exist but that churches, synagogues, or other houses of worship historically have been in the forefront and a major focal point for the dissemination of ideas on all matter of subjects effecting human conduct, expression, and advancement. Thus, an analogy to residential privacy rights would seem to ignore the historical place and power of religious institutions and forums in helping to shape general societal views and the conduct of at least not an insubstantial portion of the general citizenry. (Appendix A; emphasis in original.)

[3] During trial of this case, the lion's share of the City's evidence came from respondent's affiants. The affidavits were tested, and found wanting. Cross examination, video footage, still photographs, documents, and testimony by Westboro's picketers illustrated amply that these affidavits -- the centerpiece of respondent's position before this Court -- are mostly incomplete, unsubstantiated or untrue, and on critical issues reflect an illiteracy concerning the Scriptures and metaphors. Often the picketers' words were captured only because respondent was on the public sidewalk with a video, within feet of the picketers, video taping discussion the picketers were having among themselves. The *evidence* portrayed a remarkably different scene than the counsel-written affidavits depict. The questionable accuracy of the affidavits is forecasted in this record by Westboro's affidavit and other evidentiary submissions.

end time/duration must be posted; person must have a sign, banner or placard for ordinance to apply) the injunction does not. The injunction is considerably more restrictive than the 50-foot ordinance.

Further, there was no ordinance in place when the injunction issued. The record as it existed when the injunction issued, and the reasons therefor, is the proper scope of review here.[4]

C. The alleged use by a picketer of a term describing the male homosexual act, in the presence of a minor, does not justify the injunction.

Respondent focuses on the allegation that one of the picketers used a term which graphically describes the male homosexual act, allegedly in the presence of a minor.[5]

An open-minded, clear-headed examination of this colorful claim is helpful. Contemplate the practical implications of respondent's contention in the current social and entertainment environment. In this country, children can watch

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[4] See, e.g., *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, Syl. 1 (1983); *United States v. Mendenhall*, 446 U.S. 544, 567, 100 S.Ct. 1870, 1884, 64 L.Ed.2d 497, White, Brennan, Marshall, Stevens, JJ., dissenting (1980); *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752, Syl. 1 (1977). Respondent's brief is full of matters outside the record and for which there is zero record evidence. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 394, 109 S.Ct. 1197, 1207, 103 L.Ed.2d 412 (1989); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 394, 108 S.Ct. 636, 644, 98 L.Ed.2d 782 (1988).

[5] The affidavit offered in support of this claim was made by respondent's counter-picketer, who admittedly involved herself in this debate; there is no evidence affiant's son ever heard the alleged statement; and the evidence reflects the alleged Westboro speaker was not present on the date provided. It is questionable that this incident occurred as described, and it was likely raised in this record to protect adults from ideas which *they* find offensive. See, e.g., *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957).

paraders simulate the act, read signs and literature (mandated in school libraries) promoting the act, endure efforts to proselytize to the act in social clubs and schools, hear sermons on the subject of wedlock and ordination of those who distinguish themselves exclusively by the act, watch sitcoms and movies glamorizing the act, and see how to commit the act on the Internet. Yet if one dares use a crude reference drawing the mind to the actual vulgarity of the act, in the context of a debate about the moral erosion brought about by, or sinfulness of, the act, he is to be silenced.

The case law does not support respondent's position. Respondent contends that this term is "indecent" and therefore can be limited, resting on this Court's opinion in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). That case was and has since been limited to its exclusive context and circumstances.[6]

Still, briefly assume *arguendo* that this graphic term can be limited, even in the context of a public religious debate

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[6] In *Pacifica* this Court said that "broadcasting has the most limited First Amendment protection" because of its "uniquely pervasive presence" and because it "extend[s] into the privacy of the home" (again note the difference between a church building and residence). This Court said George Carlin's monologue about filthy words did not contribute to literary, political or scientific value, stressing that in other contexts, "Some uses of even the most offensive words are unquestionably protected." 438 U.S. at 746, 98 S.Ct. at 3039. See also *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93, 127 (1989).

The context here is a public debate, with dialogue between two groups of people voluntarily engaged in debate, which is "expression that is at the core of First Amendment protections". *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 380, 104 S.Ct. 3106, 3117, 82 L.Ed.2d 278 (1984). And even if some of the speech is unprotected, it can not be proscribed based on its viewpoint or disagreement with the message expressed. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, Syl. 4 (1992); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, --- U.S. ---, 115 S.Ct. 2338, 132 L.Ed.2d 487, Syl. 11 (1995). All feigned shock aside, a fair reading of the affidavits demonstrates respondent proposes removing the picketers because alleged speech of some picketers is offensive *because of its viewpoint*.

about homosexuality. Assume in America Person A can stand on a public sidewalk and say "God loves homosexuals. You are a hatemonger for saying God hates homosexuals" or words to that effect, and Person B, standing next to Person A on the same sidewalk, can be prohibited from responding by saying, "Do you realize that we are talking about buttfucking? Do you really believe that God loves such a thing as that?" or words to that effect. If this is to be the law of the land, then prohibit Person B from using the graphic term.[7] Do not remove an entire group of people engaged in lawful picketing[8], out of sight and sound, on the basis of the alleged use of a directly-

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[7] Topeka has an ordinance against the use of fighting words. Kansas has a statute against disorderly conduct, which the Kansas Supreme Court has limited to "fighting words" in cases involving words only. *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980). Scores of criminal cases have been filed in state and municipal court against the Westboro picketers under these laws, for words on signs or allegedly spoken. Two picketers were convicted, one in August, 1995 and one in May, 1996, over incidents unrelated to respondent (and which are currently on appeal). More than a hundred additional charges have been defended successfully, to dismissal or acquittal. This remedy is amply at the ready for use against any unprotected words by any individual picketer.

[8] Respondent says Westboro's picketing is not lawful due to criminal convictions of four picketers more than a year after the injunction issued over incidents unrelated to respondent or any picketing at 17th & Gage. Besides the two disorderly conduct convictions, see n. 7, two young men were convicted in August, 1995 and January, 1996. As noted in Westboro's petition, per sworn testimony, the local prosecutor campaigned to "get the picketers off the streets" and "ban Fred" (Westboro's preacher). This prosecutor put Westboro picketers on trial repeatedly during the summer, fall and winter, 1995-96, over how the picketers responded to physical attacks against them, and gained two convictions. One battery conviction was obtained because a picketer allegedly spat on a man who seriously injured picketers during an attack. The other conviction over a physical attack (described as "battery of a Lutheran minister" in respondent's brief at 4), occurred when this minister attacked the picketers with a hammer, on video, striking three of them in the process. Only one of five Westboro picketers prosecuted in the incident was convicted of anything. Those who attacked Westboro picketers were not prosecuted.

applicable-graphic term.[9]

Most important, mark the failure of this assertion to answer the central inquiry. What is the compelling government interest asserted, and is it valid and does it support the injunction?

If it is to protect children from hearing "indecent" words (however defined)[10], the *individual words* should be banned, per this Court's ruling in *Madsen*. Not an entire group of picketers who are engaged in lawful picketing. If it is to stop the use of words which may be unprotected, and may be fighting words, a remedy is already in place, see n. 7. If it is to protect the religious worship service occurring inside, it can not stand. As the state court said, respondent does not contend, nor does evidence suggest, that the worship service occurring inside was in any manner disrupted.[11]

If it is to protect some privacy interest in the church building, Westboro contends it can not stand. No such privacy interest should be afforded church buildings generally, or respondent in particular (because of waiver of that interest). If it is to protect the "worship experience" Westboro contends it can not stand. The question that must be decided is whether

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[9] Even if *arguendo*, the incident occurred as described in the affidavit; the term used in this context is "indecent"; and there is a legitimate basis for the government to prohibit or re-channel the use of this term in this context; removing all of the picketers "far exceeded that which was necessary", *Sable Communications of California, Inc. v. FCC, supra*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), and was not "appropriately tailored" to a legitimate objective, *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, --- U.S. ---, --- 116 S.Ct. 2374, 2377, 135 L.Ed.2d 888 (1996).

[10] In *Pacifica*, the Court said "indecent" means "not conforming to generally accepted standards of morality". A reference to the male homosexual act can not be called "indecent" by this standard, given what minors are exposed to daily, on television, in movies, at school, in their own conversation, and elsewhere, including specifically about homosexuality.

[11] A city ordinance prohibits the disruption of a worship service. Topeka Ordinance 54-164. This ordinance has never been applied to the Westboro picketers, because they do not disrupt religious worship services.

the government has a compelling interest in going into the minds and hearts of its citizens to protect them from a subjective, emotive reaction to disagreeable words, based merely on the desire to be free from those words, by cloaking the reaction in a garment called "the worship experience"?[12]

These issues are constitutionally critical, are squarely presented here, have never been decided, and are worthy of this Court's attention, without distraction by disagreement over Westboro's messages or methodologies.

D. Even if Westboro's religious beliefs are incomprehensible or abhorrent to some, this does not strip her picketers of First Amendment protection.

Couched in legal terms, respondent asserts that it finds Westboro's ways "incomprehensible", and hence Westboro's religious practices are not entitled to First Amendment protection.[13] E.g., respondent finds it "illogical" that Westboro could exist for so many years and remain so small and so out of

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[12] This is especially true where the protection is against *private* encroachment. The First Amendment's religious provisions preclude *government* interference with private religious activities, and limits government action of any kind relating to religion. Free exercise of religion is not protected against private infringement. *Tilton v. Richardson*, 6 F.3d 683, Syl. 7 (10th Cir. 1993). The test to determine whether the endorsement clause has been violated is whether the government has acted or expressed itself in a manner which favors any private religion. *Capitol Square Review and Advisory Board v. Pinette*, --- U.S. ---, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The First Amendment does not *permit* government restriction of private activity.

[13] Some may say it is incomprehensible for one to rest his spiritual wellbeing in a religious organization whose founder was a mere mortal, who formed the Church of England to throw off the yoke of the Catholic church's rule against divorce and remarriage, merely because he was the King of England with the power to do so. Or in a religious organization whose priests were profiled in the December, 1996, issue of *Penthouse* with photos of homosexual orgies on the alter. Yet no one would suggest that the Episcopal Church is not entitled to the full protection of the First Amendment.

step with modern society.[14] Respondent finds it "unacceptable" that Westboro speaks of God's hate, judgment, anger and wrath.[15] Respondent finds it "inconsistent" that the Westboro picketers could present themselves as ambassadors of Christ (2 Cor. 5:20), while in the strongest language lay the ax to the root

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[14] The pattern of a small, family-oriented, local, independent, form of worship is not foreign to the Scriptures. "For where two or three are gathered together in my name, there am I in the midst of them." Matt. 18:20. When the Roman jailor was converted, Paul and Silas baptized "he and all his". Acts 16. The book of Genesis is full of stories about the patriarchs' public worship with all that pertained to their households. Noah preached as he built an ark for 120 years, warning of God's wrath and condemnation. When he boarded the ark, he was joined only by seven members of his family. Gen. 7:7.

The Scriptures make no mention of worldwide organizations with layers of hierarchy. Instead, the New Testament tells of a church made of human stones, each fitly framed, with Jesus Christ as the chief corner stone, Eph. 2:19-21; from a calling that includes not many wise, mighty, or noble, but the foolish, weak, base and despised, 1 Cor. 1:26-28; with churches in houses, 1 Cor. 16:19 and Phil. 2.

This Court can take judicial notice that in this country's history there were many small, local churches, with generations of families serving God in fear and humility. Even today, while the large churches receive more play in the media, and have more apparent influence on the beliefs and mores of society, there are hundreds of small churches, unaffiliated with any religious organization, worshipping all over America. Imagine their surprise if they learned that they were unworthy of First Amendment protection because of their small size or humble form of worship. In truth, the worship practices of Westboro's picketers are historically and theologically sound.

[15] Jonathan Edwards' *Sinners in the Hands of an Angry God*, a sermon that was required reading in all classrooms in early America (and still found in literature books), apparently sends shock waves through modern day churches. Whether popular in any quarter, passages about hell, damnation, and the wrath of God abound in the Scriptures. Old Schools Baptists, and their doctrines of reprobation, predestination, unconditional election, limited atonement, and total depravity, are well represented in American history. Against history and the plain language of the Bible, Westboro's beliefs are not "bizarre or incredible," *Hialeah*, 508 U.S. at 530, 113 S.Ct. at 2225, quoting *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834, n. 2, 109 S.Ct. 1514, 1518, n. 2, 103 L.Ed.2d 914 (1989).

of the tree (Matt. 3:10).

This Court has said that religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 2224-2226, 124 L.Ed.2d 472 (1993). It is undisputed the topic of Westboro's street ministry is religious, howsoever characterized.[16] The sincerity of their religious convictions, no matter how abhorrent to some, is unquestioned. The picketing has sustained for nearly six years, in the face of intense media vilification, multiple criminal prosecutions, scores of physical attacks, loss of employment opportunities, and other forms of contradiction.[17] Under the law, whether comprehensible by another soul, this activity is protected religious activity.

Respondent is free in this nation to adamantly disagree with the message of the Westboro picketers, and to mobilize all manner of lawful opposition. Discomfort and disagreement may never serve as the basis for depriving protected religious activity of First Amendment protection.[18]

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[16] E.g., St. David's brief describes the message as one of hate, and quarrel with the picketers' use of such words as "fag", and "sodomite". Whatever your view may be on the subjects, these are irrefutably words from, and topics addressed in, the Bible.

[17] This phenomenon is explained by the Scriptures. "And he answered and said unto them, I tell you that, if these should hold their peace, the stones would immediately cry out." Luke 19:20. See also Hebrews 11:33-40.

[18] Respondent implies Westboro's claim should fail because her pastor is an unsavory character. Mr. Phelps is a colorful, controversial civil rights lawyer of 25 years and fundamentalist, religious activist of 47 years. He is also a faithful husband of 44 years, the father of 13 children, 11 with law degrees (as well as four children-in-law), and several with further advanced degrees, all in responsible professional positions, supporting community and school programs, and contributing members of society. The merits of Mr. Phelps' life would provide hours of interesting dialogue, which has no place before this Court. He is one of 50+ picketers impacted by the injunction, none of whom lose First Amendment protection because they are unorthodox.

Respectfully submitted,
Margie J. Phelps
Counsel of Record
3734 S.W. 12th Street
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APPENDIX

A. Temporary Restraining Order of the Shawnee County District Court in *Westboro Baptist Church, et al. v. City of Topeka, et al.*, Case No. 95-CV-1031, Enjoining Topeka Ordinance 16859.

Filed by Clerk
KS. District Court
Third Judicial District
Oct 27 4:43 PM '95
General Jurisdiction
Topeka, Kansas

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

WESTBORO BAPTIST CHURCH, INC.; FRED W. PHELPS, SR.; KARL D. HOCKENBARGER; CHARLES F. HOCKENBARGER; and TIMOTHY B. PHELPS, Plaintiffs,	)	
vs.	)	Case No. 95 CV 1031
CITY OF TOPEKA, KANSAS; JOAN HAMILTON, in Her Official Capacity as District Attorney of the State of Kansas, Third Judicial District, Defendants.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

This matter is before the court on the plaintiffs' motion for a temporary restraining order against the enforcement of city ordinances #16843, effective July 28, 1995, and #16859, effective September 20, 1995. Each deal with time and place limitation on focused picketing around events which, by the ordinances, are definitionally tied to defined religious events.

Additionally, ordinance #16859, as well, attempts to proscribed speech associated conduct within time and place restrictions defined as "demonstrating" which would constitute in legal parlance, a manner restriction on speech. Further, ordinance #16859 does not limit the situs of proscribed activities to the property and premises of a house of worship as does ordinance #16843, but proscribes activities by definition of an event including weddings and funerals without site restrictions.

The September 28, 1995, effective date ordinance, #16859, differs from the July 28, 1995, date effective ordinance by extending the place restriction for proscribed activities from 50 feet from the property line of a house of worship to 90 feet from the property line where a defined event is being held.

Although both ordinances are argued by the City as constitutional in their place distance restrictions by an analogy to specific cases involving ordinances whereby place distances restrictions on picketing have been upheld as to residences of individual citizens e.g., Frisby v. Schultz, 487 U.S. 474, 101 L.Ed. 2d 420 (1988)(limiting picketing to "before and about" to immediately in front of a residence) and City of San Jose v. Superior Court, 38 Cal. Rptr. 2d, 205, 32 Cal. App. 4th 330, cert. denied, sub nom, Thompson v. City of San Jose, 1995 WL 546172 (1995) (upholding a 300 foot proscription on picketing a residence), no case law has been proffered specifically applying such a protection of privacy to "houses of worship" or other defined "religious" events. Thus, the place restrictions imposed by these city ordinances now before the court encroach upon First Amendment areas not definitively addressed by existing case law. Further, even those cases cited proscribing residential picketing assume the residence is not being used as the site of some meeting, assembly, or other event. In this regard, no question case exist but that churches, synagogues, or other houses of worship historically have been in the forefront

and a major focal point for the dissemination of ideas on all matter of subjects effecting human conduct, expression, and advancement. Thus, any analogy to residential privacy rights would seem to ignore the historical place and power of religious institutions and forums in helping to shape general societal views and the conduct of at least not an insubstantial portion of the general citizenry.

The July 28, 1995, ordinance, by its distance enactment as a general manner and in reference to site diagrams of picketed locations, seems to merely remove focused picketers back across the street or no less than 50 feet from the property line on any side of the property where there is any entrance to a house of worship, which thereby permits a visible means of written communication by picketers with persons coming and going to a house of worship. The September 10, 1995, ordinance by reference to site diagrams in many cases prevents picketers from being across the street by virtue of its uniform 90 foot distance restriction and in some instances would either prohibit the visual message from being reasonable seen, but would also impair the focused aspect of the picketing itself either by necessary dispersal of the pickets to approaches or exits or so removing the picketers as to make the message appearing one to a general audience rather than the targeted audience.

The question raised then is what principles vis a vis the picketers First Amendment rights to relay a lawful message entitle these targeted groups to special protection from such messages which every other citizen may have the occasion to be exposed to, much more up front and close, daily anywhere in the city except perhaps at their private residences?

While the pleadings before the court and the limited testimony before the court end to identify a public need, and

have support, for a buffer zone, between those picketed and those picketing in order to promote the public peace or at least provide better evidentiary basis for the enforcement of existing laws which proscribe speech that would provoke anger in an ordinary person ("fighting words") or disturb an assembly by noisy conduct or defame a person whether by sign or verbal word, the September 20, 1995, ordinance still permits persons acting in concert with the picketers, but without holding signs, to be within 90 feet just as would be their rights under the first city ordinance or generally.

Thus, while neither ordinance proscribes this encroachment when not carrying signs, the September 20, 1995, ordinance seeks to proscribed verbal contact between picketers and those picketed by proscribing contact by those picketing with those coming to or leaving the group picketed when "addressed in a hostile or rude or loud manner". Clearly, when the law otherwise permits the physical intrusion of a person on a place, any regulation of the speech in defining the proscribed conduct must be highly deferential to both the message and the clarity of the proscription to meet First Amendment muster. Here reference to any dictionary sets a low, ambiguous, and discretionary threshold to words such as "hostile", "rude" or "loud". The First Amendment generally restricts such words not defined by reference to where they are spoken as necessitating "fighting words", words that would bring the "reasonable person", as a standard, to a desire to breach the peace or to words that are designed to instigate a riot or manner of speech that intrudes upon the use of the other's property or solitude. Otherwise, the manner or speech can not be unduly or unreasonably impeded or allowed to destroy or allowed to destroy the message of otherwise free speech. Compare, Ward v. Rock Against Racism, 491 U.S. 781, 106 L Ed. 2d 636 (1989).

Thus, as a practical matter, there is no present showing

in the record that the place of the speech, i.e., within 90 feet of a protected (religious) event, addressed to persons coming and going is, or should be, considered the constitutional equivalent of shouting "fire" in a crowded building where the shouter knows there is no fire or how those going to a protected religious event are somehow more sensitive to words spoken than any other citizen on the street whose only protection is against words that rile the average person to an urge for physical retaliation. Here, clearly the City of Topeka's existing laws protect against breach of the peace and certainly, to date, nothing would indicate any broader construction can be given to the September 20, 1996, ordinance's words "hostile", "rude" or "loud" than are already proscribed by city ordinances, yet the City here has announces an intent to dually prosecute not only the words as disorderly conduct or under other applicable city ordinances, but also under the September 20, 1995, ordinance as well, thus, doubly punishing the speaker with the only difference being the location where the words are spoken. Thus, the September 20, 1995 ordinance raises the question of whether its manner restriction is justified either by the place or the person to which the speech is addressed as well.

Thus, though certainly an ordinance of a city is entitled to a presumption of constitutionality, however where it treads on untested legal waters and must, for validity, be based on factual assumptions not evident of record, if not historically contrary, the presumption loses its force. Here is appears the best interest of all would be to reasonable maintain a status quo until all the evidence is in before exposing anyone to the wrath of the law for what may be the exercise of a constitutional freedom. The public order will be assured by enforcement of the July 28, 1995, ordinance and other immediately relevant city ordinances such as the disorderly conduct ordinance (54-121), obstruction of public ways (54-125), jostling and crowding (54-127) and the excessive noise ordinance (54-164). For this

reason, the Court will issue a temporary restraining order only against enforcement of ordinance #16859 pending resolution of the proceedings in this case unless dissolved earlier by the Court as the facts and law warrant.

ENTRY OF JUDGMENT

Judgment is entered against the City of Topeka temporarily restraining the enforcement of ordinance #16859 pending the decision on the merits in this case or until further order of the Court.

Date: October 27, 1995

/s/ Franklin R. Theis
Franklin R. Theis
District Judge